



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

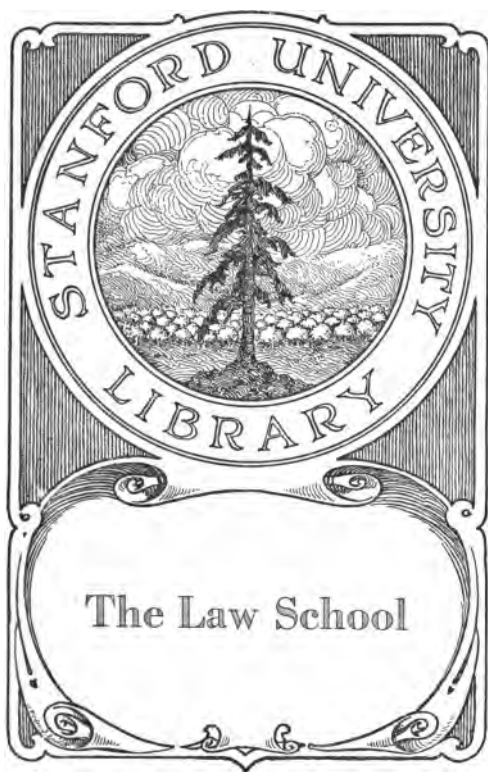
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

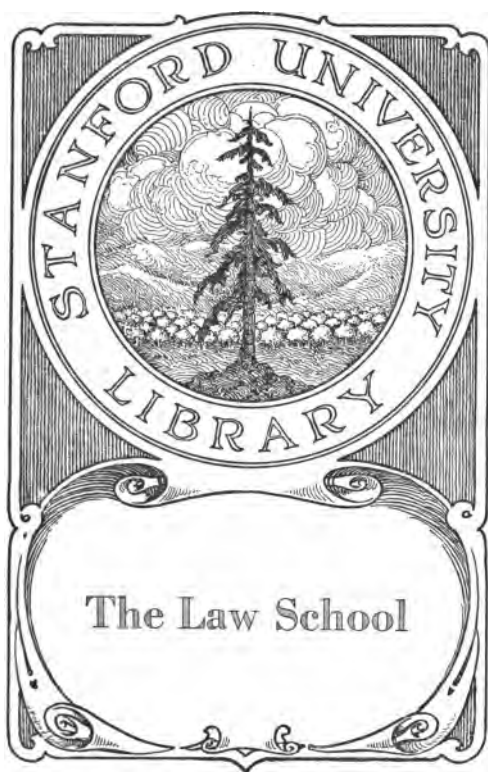
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



DL
ATS
Alire;



DL
ATS
Awe4



AN ESSAY
ON THE
LAW OF BAILMENTS.

Works recently published by W. THEOBALD, Esq.

A PRACTICAL TREATISE
ON THE
LAW OF PRINCIPAL AND SURETY.

A LETTER
TO
SIR THOMAS DENMAN,
ON THE QUESTION
WHAT IS SPECIAL PLEADING?
WITH
A Proposal of Emendations in the Forms of Action.

THE ACT FOR THE
FURTHER AMENDMENT OF THE LAW,
AND THE
INTERPLEADER ACT:
WITH NOTES.

Preparing for Publication,
A PRACTICAL TREATISE
ON THE
LAW OF PRINCIPAL AND AGENT.

AN
ESSAY
ON
THE LAW OF BAILMENTS;

BY
SIR WILLIAM JONES, KNT.

LATE ONE OF THE JUDGES OF THE SUPREME COURT OF JUDICATURE
AT BENGAL.

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptis-venditis, *conductis*-*locatis*, quibus
vitæ societas continetur, magni est iudicis statuere, (præsertim cum in plerisque sint
iudicia contraria), *quid quemque cuique præstare oporteat*.

Q. SCAEVOLA, apud Cic. de Offic. lib. iii.

The fourth Edition,

WITH

NOTES ON THE LAW

RELATING TO

CARRIERS, INNKEEPERS, WAREHOUSEMEN, AND OTHER BAILLES,

AND AN ESSAY ON THE

LAW OF COACH PROPRIETORS AND CARRIERS:

BY

WILLIAM THEOBALD,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

ROBERTSON LIBRARY

LONDON:

S. SWEET, 1, CHANCERY-LANE; A. MAXWELL, 32, AND STEVENS &
SONS, 39, BELL-YARD, LINCOLN'S INN;

Law Booksellers and Publishers:

AND MILLIKEN & SON, GRAFTON-STREET, DUBLIN.

1833.

370586

YSAJBL 0807M18

LONDON

**W M'DOWALL, PRINTER, FEMBERTON ROW,
COUGH SQUARE.**

PREFACE.

THE affection of the English public for the name of Sir WILLIAM JONES has consecrated the following Essay to immortality; and, as the principles of a classical and refined taste must for ever remain the same, time cannot impair the estimation of its various excellencies. It ought, however, to have been intitled differently: it is, properly, an essay on the principle of the bailee's legal responsibility; but "the law of bailments" comprises the whole circle of cases and decisions which have arisen peculiarly from the contracts of this species. To supply the other portions of the law is the principal object of the notes and appendix.

Last year appeared a very complete work on bailments, by Dr. Story, now a Judge, then Professor of Law in Harvard University. It is well known to how great an extent our own commercial law is adopted in America; its cases are referred to in her Courts, and expounded in her Colleges and law treatises. Dr. Story's treatise contains, with additions from the civil and foreign law, a full exposition of the common law on this subject. From this work I have derived most of

my annotations, and the article on the Law of Carriers in the Appendix. In America, however, there is, at present, no law corresponding with our Carriers' Act; (see Appx. p. xxxvi); nor with our enactments relating to carriers by water; (see Appx. p. viii). In these, and a few other instances, I have made the necessary deviations from Dr. Story. Here and there, also, I have slightly varied from his text, for the sake of greater verbal accuracy and precision: subject to these unimportant deductions, to Dr. Story belongs whatever praise may be thought due to the present editorial additions to the Essay.

WILLIAM THEOBALD.

1, *Inner Temple Lane*,
Oct. 17th, 1833.

CONTENTS.

◆

•• The paging of the original Edition is preserved in the margin of the Essay.

	Page.
INTRODUCTION - - - - -	1—4
The Subject proposed - - - - -	4
I. The Analysis - - - - -	4—11
II. The History - - - - -	11
1. Jewish and Athenian law - - - - -	11, 12
2. Roman law - - - - -	12
Prejudices against it - - - - -	12
Distinction between the <i>private</i> and <i>public</i> , the <i>rational</i> and <i>positive</i> , laws of Rome - - - - -	13, 14
Two famous laws of Ulpian - - - - -	14—16
Critical remarks on them - - - - -	17—21
Definitions and rules - - - - -	21—23
System of J. Godefroï - - - - -	24, 25
Opinions of Zasius and Donellus - - - - -	25, 26
System of Le Brun - - - - -	27—29
Vindication of the <i>old</i> system by Pothier - - - - -	29—31
Observations on Le Brun - - - - -	32—34
3. English law - - - - -	34
Lord Holt's <i>division</i> of bailments - - - - -	35
<i>New</i> division and <i>definitions</i> - - - - -	35, 36
1. Law of <i>Deposits</i> - - - - -	36
Bonion's case - - - - -	36—40
Mosaic laws - - - - -	39
Southcote's case - - - - -	41—45
Rules and <i>exceptions</i> - - - - -	46—50
Grecian and Arabian laws - - - - -	50—52
2. Law of <i>Mandates</i> - - - - -	52, 53
Distinction between <i>nonfesance</i> and <i>misfesance</i> - - - - -	54—57
Case of Coggs and Bernard - - - - -	58—62
<i>Exceptions</i> to the rule - - - - -	63
3. Law of <i>Loans</i> for use - - - - -	63—65
Criticism on Bracton - - - - -	64, <i>note</i>
Opinion of Puffendorf disputed - - - - -	66, 67
Cases and distinctions - - - - -	68—70
Controversy among the Civilians - - - - -	70

	Page.
<i>Exceptions to the rule</i> - - - - -	72
Mosaic and Attic laws - - - - -	73, 74
4. Law of <i>Pledges</i> - - - - -	74
Doctrine of Lord Coke denied - - - - -	75, 76
Conjectural criticism of Noodt - - - - -	76
Case in the Book of Assises - - - - -	77—79
Lord Coke's reasons contested - - - - -	79—83
Turkish law - - - - -	83—85
5. Law of <i>Hiring</i> - - - - -	85
1. Hiring of a Thing - - - - -	<i>ib.</i>
Lord Holt's doctrine explained - - - - -	86, 87
Rules and remarks - - - - -	88—90
2. Hiring of Work - - - - -	90, 91
Law concerning <i>Innholders</i> - - - - -	92—96
Remarks on St. German - - - - -	97, 98
Law concerning <i>Factors and Traders</i> - - - - -	98, 99
Mahomedan Law - - - - -	99
Rules and distinctions - - - - -	101
Celebrated law of Alfenus - - - - -	102
3. Hiring of Carriage - - - - -	102
<i>Exception</i> from the general rule - - - - -	104
Modern Cases - - - - -	105, 106
Law concerning <i>masters of vessels</i> - - - - -	106—109
Case of Lane and Cotton - - - - -	109, 110
Criticism on Doctor and Student - - - - -	110, <i>note</i>
4. Laws of the Northern nations - - - - -	111—114
5. Laws of the Britons - - - - -	112
6. Laws of the Indians - - - - -	113—116
III. The <i>Synthesis</i> - - - - -	117
1. Definitions - - - - -	117, 118
2. Rules - - - - -	119
3. Propositions - - - - -	119, 120
4. Exceptions - - - - -	120
5. General Corollary and Remark - - - - -	122
Conclusion - - - - -	123, 124

APPENDIX.

I. The Law relating to Common Carriers and Coach Proprietors - - - - -	i—xxxv
II. The Carriers' Act - - - - -	xxxvi—xli
III. Lord Raymond's Report of <i>Coggs v. Bernard</i> - - - - -	xli

TABLE OF THE CASES,

STATED OR REFERRED TO.

A.		C.	
Amies v. Stevens	107, vi	Calye's case	92, 94, 95, 96
Ansell v. Waterhouse	xxvi	Cameron v. Reynolds	89
Aston v. Heaven	ii, xxvii, xxviii, xxix	Catherine of Dover (The)	xxxiii
Atkinson v. Maling	83	Catley v. Wintringham	xvii, xix
		Catlin v. Bell	63
		Cavenagh v. Such	v
		Chase v. Westmore	91, xxv
		Christie v. Greggs	ii, xiii, xxvi, xxvii, xxix, xxxi
		Chute v. Wiggins	95
		Clarke v. Earnshaw	89, 91
		Cobban v. Downe	97, xv
		Coggs v. Bernard	35, 38, 58, 81, 84
		Collins v. Martin	84
		Cooper v. Barton	84, 88
		Countess of Shrewsbury's case	45
		Crawshay v. Homfray	xxv
		Croft v. Alison	89
		Crofts v. Waterhouse	xxvi, xxvii, xxix, xxx, xxxi
B.		D.	
Barcroft's case	107, xxi	Dale v. Hall	105, xv
Barber v. Bruce	xiii	Daubigny v. Duval	84
Bastard v. Bastard	iv	Davis v. Garratt	vi, vii
Batson v. Donovan	vi, xii, xxv	Davey v. Chamberlain	87
Bennet v. Mellor	95	Dean v. Keate	87
Bird v. Astock	xiv	Deese, Ex parte	91
Birkett v. Willan	xix		
—— v. Nicholson	91		
Bodenham v. Bennett	xix		
Boehm v. Combe	xv		
Bonion's case	36		
Boucher v. Lawson	iv		
Boulston v. Sandiford	v		
Bremner v. Williams	xxvi		
Brotherton v. Wood	xxvi		
Bringloe v. Morrice	69		
Broadwater v. Blot	91		
Brooke v. Pickwick	iii		
Buckman v. Levi	97, xiv		
Burgess v. Clements	95, 96		
Burton v. Hughes	53, 71		

TABLE OF THE CASES.

<i>Demainbray v. Metcalfe</i> . . .	84	<i>Harris v. Packwood</i> . . .	84, 88, 97
<i>Denew v. Daverell</i> . . .	98	<i>Hartop v. Hoare</i> . . .	53, 84
<i>Dixon v. Baldwin</i> . . .	xviii	<i>Hatchwell v. Cooke</i> . . .	i
<i>Doe v. Laming</i> . . .	95	<i>Heydon and Smith's case</i> . . .	53
<i>Dougal v. Kemble</i> . . .	xxv, xxvi	<i>Helsby v. Mears</i> . . .	v
<i>Dudley v. Smith</i> . . .	ii, xxviii, xxix	<i>Hoare v. Parker</i> . . .	83
<i>Duff v. Budd</i> . . .	xix	<i>Hodgson v. Fullarton</i> . . .	i
E.		<i>Holliday v. Camsell</i> . . .	52, 53
<i>Earl v. Rowcroft</i> . . .	xxi	<i>Hurry v. Royal Ex. Ass. Co.</i> . . .	xxii
<i>East India Com. v. Pullen</i> . . .	xv, xxii	<i>Hutton v. Bragg</i> . . .	xxv
<i>Edwards v. Shevratt</i> . . .	vi, xii	— <i>v. Osborne</i> . . .	iv
<i>Ellis v. Turner</i> . . .	v, vi	<i>Hyde v. Mersey and Trent Nav.</i>	
<i>Elsee v. Gatward</i> . . .	57	Com. . .	v, vi, xvi, xvii, xix
F.		I.	
<i>Farnsworth v. Packwood</i> . . .	96	<i>Isaac v. Clarke</i> . . .	52, 53, 84
<i>Finucane v. Small</i> 43, 75, 81, 89, 97		<i>Israel v. Clark</i> . . .	xxvii
<i>Flewelin v. Rave</i> . . .	53	J.	
<i>Forward v. Pittard</i> 97, ii, vi, xii, xiii, xvi		<i>Jackson v. Rogers</i> . . .	v, vi, xxv
G.		— <i>v. Tollett</i> . . .	xxviii
<i>Gabay v. Lloyd</i> . . .	xxii	<i>Jelly v. Clark</i> . . .	95
<i>Garnett v. Willan</i> . . .	xix, xx	<i>Jolly v. Rathbone</i> . . .	84
<i>Garside v. Trent and Mersey Nav.</i>		<i>Jones v. Boyce</i> . . .	xxvi, xxix
Com. . .	97, xvii	— <i>v. Thurloe</i> . . .	95
<i>Gibbon v. Paynton</i> . . .	106, xii	K.	
<i>Gibson v. Inglis</i> . . .	97	<i>Kemp v. Westbrook</i> . . .	84
<i>Golden v. Manning</i> . . .	xvii, xix, xx	<i>Ker v. Mountain</i> . . .	xxix, xxxi
<i>Goodwin v. Richardson</i> . . .	xxiv	<i>Kettle v. Bromsaele</i> . . .	37, 39, 62
<i>Gosling v. Burnie</i> . . .	53	<i>Kinloch v. Craig</i> . . .	xxv
— <i>v. Higgins</i> . . .	xxii	<i>Kirkman v. Shawcross</i> . . .	91
<i>Grant v. Austin</i> . . .	53	<i>Kuckein v. Wilson</i> . . .	84
— <i>v. Farmer</i> . . .	83	L.	
H		<i>Lane v. Cotton</i> . . .	62, 109, vi
<i>Hadley v. Clarke</i> . . .	39	<i>Laugher v. Pointer</i> . . .	89
<i>Harris v. Costar</i> . . .	xxvii, xxix	<i>Lawrence v. Aberdein</i> . . .	xxii
		<i>Leck v. Maester</i> . . .	91
		<i>Lickbarrow v. Mason</i> . . .	83

TABLE OF THE CASES.

xi

Lockwood v. Ewer . . .	83	Proprietors of Trent Nav. v. Wood	xii
Loeschman v. Machin . .	53	Pulteny v. Keymer . . .	84
Long v. Horne . . .	xxvi, xxvii	Q.	
Lovett v. Hobbs . . .	iii, vi	Queiroz v. Trueman . . .	84
Lyon v. Mills . . .	vi	R.	
M.		Ratcliff v. Davis . . .	78, 83, 84
Mann v. Shiffner . . .	84	Rendsberg (The) . . .	63
Marsh v. Horne . . .	84, 88, 97	Renning v. Goodchild . .	89, 109
Martini v. Coles . . .	84	Rich v. Aldred . . .	53, 71
Maving v. Todd . . .	97	— v. Kneeland . . .	106
M'Combie v. Davies . . .	84	Richardson v. Goss . . .	xviii
M'Manus v. Crickett . . .	89	Richmond v. Smith . . .	96
May v. Harvey . . .	52	Riley v. Horne . . .	104, v, xiii
Mersitor v. Cooper . . .	xxvi	Robinson v. Dunmore . .	i, ii, iv, xv, xxii, xxvii
Middleton v. Fowler . . .	v	Rooth v. Wilson . . .	46, 53, 62, 84
Miles v. Cattle . . .	53, 63	Roskell v. Waterhouse . .	97
Moore v. Morgue . . .	62	Ross v. Johnson . . .	97
— v. Wilson . . .	xxv	Rowe v. Pickford . . .	xviii
Moorsom v. Kymer . . .	xxvi	Rushforth v. Hadfield . .	25, 91
Morse v. Slew . . .	108, ii, xxv	Russell v. Palmer . . .	98
Moses v. Conham . . .	83	S.	
Mosley v. Fosett . . .	92	Sammell v. Wright . . .	89
Mouse's case . . .	xxi	Scott v. Pettit . . .	xviii
Mytton v. Cock . . .	45, 122	Sear v. Prentice . . .	98
N.		Shannon (The) . . .	xxxv
Neilson v. M'Intosh . . .	62, 63	Sharp v. Grey . . .	xxvi
Neptune (The) . . .	xxxv	Shiells v. Blackburne . .	62, 98
Newsome v. Thornton . .	84	Shipley v. Kymer . . .	84
Newton v. Trigg . . .	95	Sidaways v. Todd . . .	97
O.		Skinner v. Upshaw . . .	xxv
Ogle v. Atkinson . . .	53	Sneider v. Geiss . . .	96
Oughton v. Sepping . . .	53	Sodergren v. Flight . . .	xxv
Packard v. Getman . . .	xv	Solway v. Holloway . . .	xiv
Peacock v. Rhodes . . .	84	Southcote's case . . .	41, 53
Pickering v. Bush . . .	84		
Pothener v. Dawson . . .	83		

ESSAY

ON THE

LAW OF BAILMENTS.

HAVING lately had occasion to examine with some attention the nature and properties of that contract which lawyers call *bailment*, or a *delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered* (1), I could not but observe with sur-

(1) It has been observed that both Sir W. Jones's definitions of a bailment (see the other, p. 117) are redundant and inaccurate. Both suppose that the goods bailed are to be restored or re-delivered. But, in a bailment for sale, as, upon a consignment to a factor, no re-delivery is contemplated. In some cases, the bailee is not entitled to use the thing bailed; in others, his being entitled to use it is of the essence of the contract. Objection also has been made to Mr. Justice Blackstone's definitions of bailment (see 2 Bla. Comm. 395, 451), as "a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be *faithfully* executed;" and as "a delivery of goods to another person for a particular *use*." For, whether a *faithful* execution (if by faithful be meant a *diligent* execution) or a particular *use* (if by use be meant an actual *user* by the bailee) constitutes an indispensable ingredient in all cases of bailment, may be doubted. More properly, a bailment is a delivery of a thing for some special object or purpose, upon a contract, express or implied, to conform to that object or purpose. (Story 2).

[2]

prise that a title in our English law which seems the most generally interesting, should be the least generally understood, and the least precisely ascertained. Hundreds and thousands of men pass through life without knowing or caring to know any of the numberless niceties which attend our abstruse, though elegant, system of real property, and without being at all acquainted with that exquisite logic on which our rules of special pleading are founded: but there is hardly a man of any age or station who does not every week, and almost every day, contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depository* or a person *depositing*, of a *commissioner* or an *employer*, of a *receiver* or a *giver in pledge*; and, what can be more absurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights of which we have no just idea? Nor must it ever be forgotten that the contracts above-mentioned are among the principal springs and wheels of civil society; that, if a want of mutual confidence, or any other cause, were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces: preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable. It seems, therefore, astonishing that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, the doctrine of bailments should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part, perhaps, of juridical learning; at least, than any other part equally simple.

[3]

Such being the case, I could not help imagining that a short and perspicuous discussion of this title, an exposition of all our antient and modern decisions concerning it, an attempt to reconcile judgments apparently discordant, and to illustrate our laws by a comparison of them with those of other nations, together with an investigation of their true spirit and reason, would not be wholly unacceptable to the student of English law; especially as our excellent Blackstone, who of all men was best able to throw the clearest light on this as on every other subject, has comprised the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may safely pronounce the least satisfactory part of it; for, he represents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of a *distinct species*; he says nothing of employment by *commission*; he introduces the doctrine of a *distress*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great question of *responsibility for neglect*, he speaks so loosely and indeterminately, that no fixed ideas can be collected from his words (a). His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer; if, indeed, all the titles which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope, at length, to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which

[4]

(a) 2 Comm. 452, 453, 454.

every lover of humanity and peace must anxiously wish to see accomplished. The following essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary, in the Commentaries on the Laws of England.

Subject proposed.

I propose to begin with treating the subject analytically, and, having traced every part of it up to the first principles of natural reason, shall proceed historically to shew with what perfect harmony those principles are recognized and established by other nations, especially the Romans, as well as by our English courts, when their decisions are properly understood and clearly distinguished; after which I shall resume synthetically the whole learning of bailments, and expound such rules as, in my humble apprehension, will prevent any further perplexity on this interesting title, except in cases very peculiarly circumstanced.

[5]
I. Analysis.

From the obligation contained in the definition of bailment, *to restore the thing bailed at a certain time* (2), it follows that the bailee must *keep* it, and be *responsible* to the bailor *if it be lost or damaged*: but, as the bounds of justice would in most cases be transgressed, if he were made answerable for the loss of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment*: and the investigation of this *degree* in every particular contract is the problem which involves the principal difficulty.

(2) It is almost too trivial to be noticed, that a new condition is here introduced into the definition of a bailment, and one which, in this place at least, is irrelevant; for, from the obligation to restore, considered abstractedly, and apart from any limitation in point of time, the obligation to keep and to answer for loss or damage follows.

There are infinite shades of care or diligence, from the slightest momentary thought or transient glance of attention, to the most vigilant anxiety and solicitude; but extremes in this case, as in most others, are inapplicable to practice: the first extreme would seldom enable the bailee to perform the condition, and the second ought not in justice to be demanded; since it would be harsh and absurd to exact the same anxious care which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees, then, of care for which we are seeking, must lie somewhere between these extremes; and, by observing the different manners and characters of men, we may find a certain standard which will greatly facilitate our inquiry; for, although some are excessively careless, and others excessively vigilant, and some through life, others only at particular times, yet we may perceive that the generality of rational men use nearly the same degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence and capable of governing a family* takes of *his own* concerns (3),

[6]

(3) Or rather, as Dr. Story expresses it, the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them. The variable character of the standard of diligence is illustrated by Dr. Story in the following pleasing manner. "In one country or in one age," says he, "acts may be deemed negligent, which, at another time, or in another country, may be justly deemed an exercise of ordinary diligence; and it is important to attend to this consideration, not merely to deduce the *implied* obligations of a party in a given case, but also to possess ourselves of the true measure by which to fix the application of the general rule. Thus, in times of primitive or pastoral simplicity, when it was customary to leave flocks to roam at large by night, it would not be a want of ordinary diligence to allow a neighbour's flock, which is deposited with us, to roam in the same manner.

is a proper measure of that which would uniformly be required in performing every contract, if there were not

But, if the general custom were, at night, to pen them in a fold, it would doubtless be a want of such diligence, not to do the same with them. In many parts of our country, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is quite usual to leave barns, in which horses and other cattle are kept, without being locked by night. But, in cities, where the danger is much greater, and the temptations more pressing, it would be deemed a great want of caution to do the same. If a man were to leave his friend's horse in his field, or in his barn, all night, in many country towns, and the horse were stolen, it would not be imagined that any responsibility was incurred. But if, in a large city, the same want of precaution were shown, it would be deemed, in many cases, gross neglect. If robbers were known to frequent a particular district of country, much more precaution would be required than in districts where robberies were of very rare occurrence. What, then, is usually done in a country in respect to things of a like nature, whether more or less in point of diligence than is exacted in another country, is in fact the general measure of diligence.

"The customs of trade and the course of business also have an important influence. If, in the course of a particular trade, particular goods, as, for instance, coals, are usually left on a wharf without any guard or protection during the night, and they are stolen, the wharfinger, or other person having the custody, might not be responsible for the loss, although, for a like loss of other goods not falling under a like predicament, he might be responsible. If a chaise were left during the night under an open shed, and were stolen, the bailee might not be liable for the loss, if such was the usual practice of the place; and yet he would be, if other precautions were usually taken. In short, diligence is usually proportioned to the degree of danger of loss, and that danger is, in different states of society, compounded of very different elements. What constitutes ordinary diligence may also be materially affected by the nature, bulk, and value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of dollars; of a bale of cotton as of a box of jewelry; of a load of wood as of a package of paintings; of a block of marble as of a sculptured statue. The value, especially, is an in-

strong reasons for *exacting* in some of them a *greater*, and *permitting* in others a *less*, degree of attention. Here, then, we may fix a constant determinate point, on each side of which there is a series consisting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the case admits of indulgence or demands rigour: if the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the measure will be that care which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful* gives to the securing of his personal property.

The fixed mode or standard of diligence I shall, for want of an apter epithet, invariably call *ordinary*; although that word is equivocal, and sometimes involves a notion of degradation which I mean wholly to exclude; but the unvaried use of the word in one sense will prevent the least obscurity. The degrees on each side of the standard being indeterminate, need not be distinguished by any precise denomination; the first may be called *less*, and the second *more than ordinary* diligence.

Superlatives are exactly true in mathematics; they approach to truth in abstract morality; but, in practice and actual life, they are commonly false: they are often, indeed, used for mere intensives, as *the most* diligent for *very* diligent; but this is a rhetorical figure; and, as

gradient to be taken into consideration upon every question of negligence; for, that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of a common parcel, would not be so." (Story. 9).

rhetoric, like her sister, poetry, delights in fiction, her language ought never to be adopted in sober investigations of truth; for this reason, I would reject from the present inquiry all such expressions as *the utmost care*, *all possible* or *all imaginable diligence*, and the like, which have been the cause of many errors in the code of antient Rome, whence, as it will soon be demonstrated, they have been introduced into our books even of high authority.

[8]

Just in the same manner, there are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity: these are the omissions of the before-mentioned degrees of diligence, and are exactly correspondent with them. Thus, the omission of that *care which every prudent man takes of his own property*, is the determinate point of negligence, on each side of which is a series of variable modes of default infinitely diminishing in proportion as their opposite modes of care infinitely increase; for, the want of extremely great care is an extremely little fault, and the want of the slightest attention is so considerable a fault that it almost changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of trust, and a deviation from common honesty. This known or fixed point of negligence is therefore a mean between *fraud* and *accident*; and, as the increasing series continually approaches to the first extreme, without ever becoming precisely equal to it, until the last term melts into it or vanishes, so the decreasing series continually approximates to the second extreme, and at length becomes nearer to it than any assignable difference: but the last terms being, as before, excluded, we must look within them for modes applicable to practice; and these we

shall find to be the omissions of such care as *a man of common sense, however inattentive* (4), and of such as a *very cautious and vigilant* man, respectively, take of *their own possessions*.

The constant or fixed mode of default I likewise call *ordinary*, not meaning by that epithet to diminish the culpability of it, but wanting a more apposite word, and intending to use this word uniformly in the same sense: of the two variable modes, the first may be called *greater*, and the second *less*, than ordinary; or, the first *gross*, and the other *slight* neglect.

[9]

It is obvious that a bailee of common honesty, if he also have common prudence, would not be *more* negligent than ordinary in keeping the thing bailed: such negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not less obvious, though less pertinent to the subject, that infinite degrees of *fraud* may be conceived, increasing in a series from the term where *gross neglect* ends, to a term where positive *crime* begins; as *crimes* likewise proceed gradually from the lightest to the most atrocious; and, in the same manner, there are infinite degrees of *accident*, from the limit of extremely slight neglect, to a *force irresistible* by any human power. Law, as a practical science, cannot take notice of melting lines, nice discriminations, and evanescent quantities;

(4) Perhaps the measure is expressed here a little too loosely; for, a man may possess common sense, or even uncommon, and yet be so grossly inattentive to his own concerns as to deserve the appellation of having no prudence at all. The measure is rather to be drawn from the diligence which men habitually careless, or of little prudence (not "however inattentive" they may be), generally take of their own concerns.

but it does not follow that *neglect, deceit, and accident* are to be considered as indivisible points, and that *no degrees whatever* on either side of the standard are admissible in legal disquisitions.

Having discovered the several modes of *diligence* which may justly be demanded of contracting parties, let us inquire in what particular cases a bailee is by natural law bound to use them, or to be answerable for the omission of them.

[10]

When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard; nothing more, therefore, ought in that case to be required than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect*: but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.

If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than good faith were exacted from such a person, that is, if he were to be made answerable for less than *gross neglect*, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.

On the other hand, *when the bailee alone is benefited or accommodated by his contract*, it is not only reasonable that he who receives the benefit should bear the burden, but, if he were not obliged to be *more than ordinarily* careful, and bound to answer even for *slight neglect*, few men (for, acts of pure generosity and friendship are not here to be supposed) would part with their goods

for the mere advantage of another, and much convenience would consequently be lost in civil society.

This distinction is conformable, not only to natural reason, but also, by a fair presumption, to the *intention of the parties*, which constitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expressed*, the rule (as in devises) yields to it; and a bailee without benefit, may, by a special undertaking, make himself liable for *ordinary* or *slight* neglect, or even for inevitable *accident*: hence, as an agreement that a man may safely be dishonest is repugnant to decency and morality, and, as no man shall be presumed to bind himself against irresistible force, it is a just rule that every bailee is responsible for *fraud*, even though the contrary be stipulated, but that no bailee is responsible for *accident*, unless it be most expressly so agreed. [11]

The plain elements of natural law on the subject of responsibility for neglect, having been traced by this short analysis, I come to the second, or historical part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and the English. II. The history.

Of all known laws the most antient and venerable are those of the Jews; and among the Mosaic institutions we have some curious rules on the very subject before us; but, as they are not numerous enough to compose a system, it will be sufficient to interweave them as we go along, and explain them in their proper places; for a similar reason, I shall say nothing here of the Attic laws on this title, but shall proceed at once to that nation by which the wisdom of Athens was eclipsed, and her glory extinguished. Jewish and Athenian law. [12]

Roman law.

The decisions of the old Roman lawyers, collected and arranged in the sixth century by the order of Justinian, have been for ages, and in some degree still are, in bad odour among Englishmen: this is an honest prejudice, and flows from a laudable source; but a prejudice most certainly it is, and, like all others, may be carried to a culpable excess.

[13] The constitution of Rome was originally excellent; but, when it was *settled*, as historians write, by Augustus, or, in truer words, when that base dissembler and cold-blooded assassin, C. Octavius, gave law to millions of honester, wiser, and braver men than himself, by the help of a profligate army and an abandoned senate, the new form of government was in itself absurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the state, both executive and legislative, was a tyrannous ordinance, with the name only, not the nature of a law (*b*): had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *sons* of those who consented to it: for, “a renunciation of *personal* rights, especially rights of the highest nature, can have no operation beyond the *persons* of those who renounce them.” Yet, iniquitous and odious as the settlement of the constitution was, Ulpian only spoke in conformity to it when he said that “the will of the prince had the force of law;” that is, as he afterwards explains himself, *in the Roman empire*; for, he neither meant, nor could be mad enough to mean, that the proposition was just or true as a general maxim. So congenial, however, was this rule or sentence, ill understood and worse applied, to the minds of our early Norman kings, that some of them, according to Sir John Fortescue, “were not pleased with their own laws, but

(*b*) D. 1. 4. 1.

exerted themselves to introduce the civil laws of Rome into the government of England (c);” and so hateful was it to our sturdy ancestors, that, if John of Salisbury be credited, “they burned and tore all such books of civil and canon law as fell into their hands (d): but this was intemperate zeal; and it would have been sufficient to improbate the *public* or *constitutional* maxims of the Roman imperial law as absurd in themselves as well as inapplicable to our free government, without rejecting the whole system of *private* jurisprudence as incapable of answering even the purpose of illustration. Many *positive* institutions of the Romans are demonstrated by Fortescue, with great force, to be far surpassed in justice and sense by our own immemorial customs; and the rescripts of Severus or Caracalla, which were laws, it seems, at Rome, have certainly no kind of authority at Westminster; but, in questions of *rational* law, no cause can be assigned why we should not shorten our own labour by resorting occasionally to the wisdom of antient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense, all circumstances remaining, in another; and pure unsophisticated reason is the same in Italy and in England, in the mind of a Papinian and of a Blackstone.

Distinction between the *private* and *public*, the *rational* and *positive* laws of Rome.

[14]

Without undertaking, therefore, in all instances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celsus or with himself, I shall proceed to exhibit a summary of the Roman law on the subject of *responsibility for neglect*.

The two great sources whence all the decisions of civilians on this matter must be derived, are two laws of Ulpian; the first of which is taken from his work on Sa-

Two famous laws of Ulpian.

(c) De Laud. Leg. Angl. c. 33 34

(d) Seld. in Fort. c. 33.

[15] binus, and the second from his tract on the Edict: of both these laws I shall give a verbal translation according to my apprehension of their obvious meaning, and shall then state a very learned and interesting controversy concerning them, with the principal arguments on each side, as far as they tend to elucidate the question before us.

“Some contracts,” says the great writer on Sabinus, “make the party responsible for *deceit* only; some, both for *deceit* and *neglect*. Nothing more than responsibility for *deceit* is demanded in *deposits* and *possession at will*; both *deceit* and *neglect* are inhibited in *commissions*, *lending for use*, *custody after sale*, *taking in pledge*, *hiring*; also in *portions*, *guardianships*, *voluntary work*: (among these *some* require even more than ordinary *diligence*). *Partnership* and *undivided property* make the partner and joint-proprietor answerable for both *deceit* and *negligence* (e).

[16] “In contracts,” says the same author, in his other work, “we are sometimes responsible for *deceit alone*; sometimes for *neglect also*; for *deceit only* in *deposits*, because, since *no benefit* accrues to the depositary, he can justly be answerable for no more than *deceit*; but, if a *reward* happen to be given, then a responsibility for *neglect also* is required; or, if it be agreed at the time of the contract, that the depositary shall answer both for *neglect* and for *accident*: but, where a *benefit* accrues to both parties—as in *keeping a thing sold*, as in *hiring*, as in *portions*, as in *pledges*, as in *partnerships*—both

(e) Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantum depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotisdatio, tutelæ, negotia gesta: (in his quidam et diligentiam). Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

deceit and neglect make the party liable. *Lending for use*, indeed, is for the most part *beneficial* to the borrower only; and, for this reason, the better opinion is that of Q. Mucius, who thought, that *he* should be responsible not only for *neglect*, but even for the omission of more than ordinary *diligence*.(f)."

One would scarce have believed it possible that there could have been two opinions on laws so perspicuous and precise composed by the same writer, who was indubitably the best expositor of his own doctrine, and apparently written in illustration of each other; the first comprising the rule, and the second containing the reason of it: yet the single passage extracted from the book on Sabinus has had no fewer than twelve particular commentaries in latin (g), one or two in greek (h), and some in the modern languages of Europe, besides the general expositions of that important part of the digest in which it is preserved. Most of these I have perused with more admiration of human sagacity and industry than either solid instruction or rational entertainment; for, these authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art

Critical remarks.
[17]

(f) In contractibus interdum dolum solum, interdum et culpam, præstamus; dolum in deposito; nam, quia nulla utilitas ejus versatur, apud quem deponitur, merito dolum præstatur solus; nisi forte et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur; aut, si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur: sed, ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolum et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus cui commodatur; et ideo verior est Q. Mucii sententia existimantis et culpam præstandam et diligentiam. D. 13. 6. 5. 2.

(g) Bocerus, Campanus, D'Avezan, Del Rio, Le Conte, Rittershusius, Giphanius, J. Godefroi, and others.

(h) The scholium on Harmenopulus, l. 6. tit. de Reg. Jur. n. 55. may be considered as a commentary on this law.

[18]

rather of clouding texts in themselves clear, than of elucidating passages which have any obscurity in the words or the sense of them. Campanus, indeed, who was both a lawyer and a poet, has turned the first law of Ulpian into latin hexameters; and his authority, both in prose and verse, confirms the interpretation which I have just given.

The chief causes of all this perplexity have been, first, the vague and indistinct manner in which the old Roman lawyers, even the most eminent, have written on the subject; secondly, the loose and equivocal sense of the words *diligentia* and *culpa*; lastly and principally, the darkness of the parenthetical clause, *in his quidam et diligentiam*, which has produced more doubt as to its true reading and signification than any sentence of equal length in any author, greek or latin. Minute as the question concerning this clause may seem, and dry as it certainly is, a short examination of it appears absolutely necessary.

[19]

The vulgate editions of the pandects, and the manuscripts from which they were printed, exhibit the reading above set forth; and it has accordingly been adopted by Cujas, P. Faber, Le Conte, Donellus, and most others, as giving a sense both perspicuous in itself and consistent with the second law; but the Florentine copy has *quidem*, and the copies from which the Basilica were translated centuries after Justinian, appear to have contained the same word, since the Greeks have rendered it by a particle of similar import. This variation in a single letter makes a total alteration in the whole doctrine of Ulpian; for, if it be agreed that *diligentia* means, by a figure of speech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the second law before cited, that “*some*

of the preceding contracts demand that higher degree;" but the Florentine reading will denote, in contradiction to it, that "all of them require more than ordinary exertions."

It is by no means my design to depreciate the authority of the venerable manuscript preserved by Florence; for, although few civilians, I believe, agree with Politian in supposing it to be one of the *originals* which were sent by Justinian himself to the principal towns of Italy (*i*), yet it may *possibly* be the very book which the Emperor Lotharius II. is *said* to have found at Amalfi about the year 1130, and gave to the citizens of Pisa, from whom it was taken near three hundred years after by the Florentines, and has been kept by them with superstitious reverence (*k*): be that as it may, the copy deserves the highest respect; but, if any proof be requisite that it is no *faultless* transcript, we may observe, that, in the very law before us, *accedunt* is erroneously written for *accidunt*; and the whole phrase, indeed, in which that word occurs, is different from the copy used by the Greek interpreters, and conveys a meaning, as Bocerius and others have remarked, not supportable by any principle or analogy.

[20]

This, too, is indisputably clear, that the sentence, "in his *quidem* et diligentiam," is ungrammatical, and cannot be construed according to the interpretation which some contend for. What verb is understood? *Recipiunt*. What noun? *Contractus*. What then becomes of the words in his, namely *contractibus*, unless in signify *among*? And, in that case, the difference between *quidem* and *quidam* vanishes; for, the clause may still import, that, "among the preceding contracts (that is, in

(i) Epist. x. 4. Miscell. cap. 41. See Gravina, lib. i. § 141.

(k) Taurelli, Præf. ad Pand. Florent.

some of them), more than usual diligence is exacted:" in this sense, the Greek preposition seems to have been taken by the scholiast on harmenopolus; and it may here be mentioned, that *diligentia*, in the nominative, appears in some old copies as the Greeks have rendered it; but Accursius, Del Rio, and a few others, consider the word as implying no more than diligence *in general*, and distinguish it into various *degrees* applicable to the several contracts which Ulpian enumerates. We may add, that one or two interpreters thus explain the whole sentence, "in his *contractibus* quidam *jurisconsulti* et *diligentiam requirunt*:" but this interpretation, if it could be admitted, would entirely destroy the authority of the clause, and imply that Ulpian was of a different opinion. As to the last conjecture, that only *certain cases* and *circumstances* are meant by the word *quidam*, it scarce deserves to be repeated. On the whole, I strongly incline to prefer the vulgate reading, especially as it is not conjectural, but has the authority of manuscripts to support it; and the mistake of a letter might easily have been made by a transcriber, whom the prefaces, the epigram prefixed, and other circumstances, prove to have been, as Taurelli himself admits, a Greek. Whatever, in short, be the genuine words of this much-controverted clause, I am persuaded that it ought by no means to be strained into an inconsistency with the *second* law; and this has been the opinion of most foreign jurists, from Azo and Alciat down to Heineccius and Huber; who, let their dissension be, on other points, ever so great, think alike in distinguishing *three degrees* of neglect, which we may term *gross*, *ordinary*, and *slight*, and in demanding responsibility for those degrees according to the rule before expounded.

The law, then, on this head, which prevailed in the

antient Roman empire, and still prevails in Germany, Spain, France, Italy, Holland, constituting, as it were, a part of the law of nations, is in substance what follows.

Gross neglect, lata culpa, or, as the Roman lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *dolus*, or *fraud* (5) itself; and

Definitions and rules.

(5) Dr. Story remarks, that, in various passages of this essay, it seems to be assumed, that, in the common law, as in the civil law, gross negligence and fraud are equivalent. Thus, he observes, *ordinary* negligence is spoken of as "a mean between fraud and accident" (p. 8); gross negligence, as "inconsistent with good faith" (pp. 10, 46, 119); and a bailee without reward, as being "answerable only for fraud, or for gross negligence, which is considered evidence of it" (p. 46). But this doctrine is not warranted by the common law authorities. One case opposed to it is put by Sir W. Jones himself. If, he says, (p. 47), a depositor commits a gross neglect in regard to his own goods, as well as those which are bailed, by which both are lost or damaged, he cannot be said to have violated good faith, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person. So, where a cartoon was left in the hands of an auctioneer, without any particular agreement to take care of it, or re-deliver it safe, and without any agreement for a reward, and it appeared that the painting was upon paper pasted on canvas, and that the bailee kept it in a room next to a stable in which there was a wall which had made it damp and peal—it was held gross neglect, and the bailee was made responsible, although there was no imputation of fraud. These cases shew that gross negligence is not equivalent to fraud, according to the common law authorities. On the contrary, gross negligence is, or at least may be, entirely consistent with good faith and honesty of intention; and, to confound it with fraud, would be most mischievous, for, then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to recover. A man may leave a casket of jewels or a purse of gold upon the table of a public room at an inn, or may leave a package of bank bills in a

[22]

consists, according to the best interpreters, in the *omission* of that care *which even inattentive and thoughtless men never fail to take of their own property*: this fault they justly hold a violation of *good faith*.

Ordinary neglect, levis culpa, is the *want* of that diligence which the *generality of mankind use in their own concerns*, that is, of *ordinary care*.

Slight neglect, levissima culpa, is the *omission* of that care which *very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence*.

Now, in order to ascertain the degree of neglect for which a man who has in his possession the goods of another is made responsible by his contract, either *express* or *implied*, civilians establish *three* principles, which they deduce from the law of Ulpian on the edict; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus (l)*; as many poems and histories in antient languages are denominated from their *initial* words.

First, in contracts which are beneficial *solely* to the

(l) Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Instead of *ff*, which is a barbarous corruption of the initial letter of *κατὶνάλαι*, many write *D.*, for *Digest*, with more clearness and propriety.

great coat in the common entry of an inn, from pure thoughtlessness; and a jury might be well satisfied that it was gross negligence. But, if fraud were a necessary ingredient, the very statement of the case would negative a right of recovery. Besides, if gross negligence were equivalent to fraud, there could be no defence set up by the bailee, founded either on his own conduct in respect to his own goods, or on a special contract not to be liable for gross negligence. But there is no principle in our law that would prevent a depositary from contracting not to be liable for any degree of mere negligence.

owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect; this, therefore, is the general rule in *deposits*; but, in regard to *commissions*, or, as foreigners call them, *mandates*, and the *implied* contract, *negotiorum gestorum*, a certain care is requisite, from the *nature of the thing*; and, as *good faith* itself demands that such care be proportioned to the exigence of each particular case, the law *presumes* that the mandatary or commissioner, and, by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence *adequate to the performance of the work undertaken* (m).

[23]

Secondly, in contracts *reciprocally* beneficial to both parties, as in those of *sale*, *hiring*, *pledging*, *partnership*, and the contract implied in *joint property*, such care is exacted *as every prudent man commonly takes of his own goods*; and, by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are answerable for *ordinary* neglect.

Thirdly, in contracts from which a benefit accrues *only* to him who has the goods in his custody, as in that of *lending for use*, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore, responsible for *slight* negligence.

This had been the learning generally, and almost unanimously received and taught by the doctors of Roman law; and it is very remarkable that even Antoine Favre, or Faber, who was famed for innovation and paradox, who published two ample volumes, *De Erroribus Interpretum*, and whom Gravina justly calls the *boldest of expositors* and the *keenest adversary of the practisers* (n),

[24]

(m) Spondet diligentiam, say the Roman lawyers, gerendo negotio parem—Vide post, p. 63, n.—T.

(n) Orig. Jur. Civ. lib. i. § 183.

discovered no error in the common interpretation of two celebrated laws which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger Godefroi, of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular commentary on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the antient Romans, and endeavours to support a new system of his own.

System of J.
Godefroi.

He adopts, in the first place, the Florentine reading, of which the student, I hope, has formed, by this time, a decided opinion from a preceding page of this essay.

[25]

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet admits that the rule which he condemns had the approbation and support of Modestinus, of Paulus, of Africanus, of Gaius, and of the great Papinian himself; nor does he satisfactorily prove the fallaciousness to which he objects, unless every rule be fallacious to which there are some exceptions. He understands by *diligentia* that care which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts which immediately precede the disputed clause; in the two which follow it, he requires no more than *ordinary* diligence. He admits, however, the three degrees of neglect above stated, and uses the common epithets, *levis* and *levissima*; but, in order to reconcile his system with many laws which evidently oppose it, he ascribes to the old lawyers the wildest mutability of opinion, and is even forced to contend that Ulpian himself *must have changed his mind*.

Since his work was not published, I believe, in his lifetime, there may be reason to suspect that he had not com-

pletely settled *his own* mind; and he concludes, indeed, with referring the decision of every case on this head to that most dangerous and most tremendous power, *the discretion of the judge (o)*.

The *triple* division of neglects had also been highly censured by some lawyers of reputation. Zazius had very justly remarked, that neglects differed in *degree*, but not in *species*; adding, "that he had no objection to the use of the words *levis* and *levissima* merely as terms of practice adopted in courts for the more easy distinction between the different degrees of care exacted in the performance of different contracts (*p*):" but Donellus, in opposition to his master Duaren, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism (*q*); the minor proposition of which is raised on the figurative and inaccurate manner in which positives are often used for superlatives, and conversely, even by the best of the old Roman lawyers. True it is, that, in the law *Contractus*, the division appears to be *twofold* only, *dolus* and *culpa*; which differ in *species*, when the first means *actual fraud and malice*, but in *degree* merely when it denotes no more than *gross neglect*; and, in either case, the second branch, being capable of *more* and *less*, may be subdivided into *ordinary* and *slight*; a subdivision which the law *Si ut certo* obviously requires: and thus are both laws perfectly reconciled.

Systems of Zazius and Donellus.

[26]

(o) "Ergo certe hac in re consentibus accedo, vix quidquam generalius definiri posse; remque hanc ad *arbitrium judicis*, prout res est, referendam." p. 141.

(p) Zas. Singul. Resp. lib. i. cap. 2.

(q) "Quorum definitiones eadem sunt, ea inter se sunt eadem; *levis* autem culpæ et *levissimæ* una et eadem definitio est: utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

We may apply the same reasoning, changing what should be changed, to the *triple* division of *diligence*; for, when *good faith* is considered as implying at least the exertion of *slight* attention, the other branch, *care*, is subdivisible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already established both by the analysis and by authority.

[27]

System of Le
Brun.

Nevertheless, a system, in one part entirely new, was broached in the present century by an advocate in the Parliament of Paris, who may, probably, be now living, and, possibly, in that professional station to which his learning and acuteness justly entitle him. I speak of M. Le Brun, who published, not many years ago, an Essay on Responsibility for Neglect (*r*), which he had nearly finished before he had seen the commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges Godefroi with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads in *his quidem et diligentiam*; and that with an air of triumph; insinuating, that *quidam* was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing *their* system; and he supports his own reading by the authority of the *Basilica*; an authority, which, on another occasion, he depreciates. He derides the absurdity of *permitting negligence* in any contract, and urges, that such *permission*, as he calls it, is against express law: "Now," says he, "where a contract is beneficial to both parties, the doctors *permit*

[28]

(*r*) *Essai sur la Prestation des Fautes*, a Paris, chez Saugrain, 1764.

slight negligence, which, how slight soever, is still *negligence*, and ought always to be inhibited." He warmly contends that the Roman laws, properly understood, admit only two degrees of diligence; one, measured by that which a *provident and attentive father of a family* uses in his own concerns; another, by that care which the *individual party* of whom it is required is *accustomed to take of his own possessions*: and he very ingeniously substitutes a new rule in the place of that which he rejects; namely, that, *when the things in question are the sole property of the person to whom they must be restored*, the holder of them is obliged to keep them with the *first degree of diligence*; whence he decides, that a *borrower* and a *hirer* are responsible for precisely the same neglect; that a *vendor*, who retains for a time the custody of the goods sold, is under the same obligation, in respect of care, with a man who undertakes to manage the affairs of another, either *without* his request, as a *negotiorum gestor*, or *with* it, as a *mandatary*. "But," says he, "*when the things are the joint property of the parties contracting*, no higher diligence can be required than the *second degree*, or that which the *acting party* commonly uses in *his own* affairs; and it is sufficient if he keep them as he keeps his own." This he conceives to be the distinction between the eight contracts which precede, and the two which follow the words "in his quidem et diligentiam."

[29]

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters, from Bartolus to Vinnius.

At the time when this author wrote, the learned M. Pothier was composing some of his admirable treatises

on all the different species of express or implied contracts; and here I seize, with pleasure, an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again; for, if his great master Littleton has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans (s): for my own part, I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public than barely the introduction of Pothier to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt which *every man*, according to Lord Coke, *owes to his profession*.

[30]

Vindication of
the old system
by Pothier.

To this venerable professor and judge (for, he had sustained both characters, with deserved applause,) Le Brun sent a copy of his little work; and M. Pothier honoured it with a short but complete answer in the form of a General Observation on his Treatises (t); declaring, at the

(s) Oeuvres de M. Pothier, a Paris, chez Debure: 28 volumes in duodecimo, or 6 in quarto. The illustrious author died in 1772—(6).

(t) It is printed apart, in fourteen pages, at the end of his Treatise on the Marriage-contract.

(6) The facility of obtaining separately or collectively the works of Pothier, and their very moderate price, leaves the English lawyer no excuse for not making himself in some degree acquainted with them. The republication of the Treatise on the Law of Obligations, translated by the late Sir W. D. Evans, Recorder of Bombay, is a desideratum for those who are too indolent to resort to it in the author's own language.

same time, that *he would not enter into a literary contest*, and apologizing for his fixed adherence to the ancient system, which he politely ascribes to *the natural bias of an old man in favour of opinions formerly imbibed*. This is the substance of his answer: "That he can discover no kind of absurdity in the usual division of *neglect* and *diligence*, nor in the *rule* by which different *degrees* of them are applied to different contracts; that, to speak with strict propriety, negligence is not *permitted* in any contract, but a *less rigorous construction* (7) prevails in some than in others; that a *hirer*, for instance, is not considered as *negligent*, when he takes the same care of the goods hired which the generality of mankind take of their own; that the *letter to hire*, who has his reward, must be presumed to have demanded at first no higher degree of diligence, and cannot justly complain of that *inattention* which in another case might have been culpable; for, a *lender*, who has *no* reward, may fairly exact from the borrower that *extraordinary* degree of care which *a very attentive person of his age and quality* would certainly have taken; that the diligence which *the individual party commonly uses in his own affairs* cannot properly be the object of judicial inquiry; for, *every* trustee, administrator, partner, or co-proprietor, must be *presumed* by the court, auditors, or commissioners, before whom an account is taken, or a

[31]

(7) In his usual lucid manner, Dr. Story observes, that the law considers diligence to be in some sort a relative term; and it must be judged of from the nature of the bailment, and all other ingredients which may fairly be presumed to enter into the contemplation of the parties. He who asks a favour has no right to expect to be absolved from a proportionate care; and he who accepts a burden, has a right to demand that he shall not be required to be as scrupulously exact as if he received a benefit.

distribution or partition made, to use in *their own* concerns such diligence as is commonly used by *all prudent men*; that it is a violation of *good faith* for any man to take less care of another's property which has been intrusted to him, *than of his own*; that, consequently, the author of the new system demands no more of a *partner* or a *joint-owner* than of a *depository*, who is bound to keep the goods deposited *as he keeps his own*; which is directly repugnant to the indisputable and undisputed sense of the law *Contractus*."

[32] I cannot learn whether M. Le Brun ever published a reply, but am inclined to believe that his system has gained very little ground in France, and that the old interpretation continues universally admitted on the continent both by theorists and practisers.

Nothing material can be added to Pothier's argument, which, in my humble opinion, is unanswerable; but it may not be wholly useless to set down a few general remarks on the controversy: particular observations might be multiplied without end.

Observations
on Le Brun.

The only *essential* difference between the systems of Godefroi and Le Brun relates to the two contracts which follow the much-disputed clause; for, the Swiss lawyer makes the partner and co-proprietor answerable for *ordinary* neglect, and the French advocate demands no more from them than *common honesty*: now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously that the other part of it fails in the article of Marriage-portions (*u*).

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal;

(u) See p. 71, note; and p. 126.

yet, even on this head, Le Brun seems to be self-confuted: he begins with engaging to prove "that only *two* degrees of fault are distinguished by the laws of Rome," and ends with drawing a conclusion that they acknowledge but *one* degree; now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of *diligence*, the omissions of which are as many neglects, exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that which he repudiates. It is true that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system (*v*). [33]

This disquisition amounts, in fact, to this; from the barrenness or *poverty*, as Lucretius calls it, of the Latin language, the single word *culpa* includes, as a generic term, various degrees or shades of *fault*, which are sometimes distinguished by epithets, and sometimes left without any distinction; but the Greek, which is rich and flexible, has a term expressive of almost every shade, and the translators of the law *Contractus* actually use the words *ῥαθυμία* and *ἀμέλεια*, which are by no means synonymous, the former implying a certain *easiness of mind* or *remissness of attention*, while the second imports a higher or more culpable degree of *negligence* (*w*). This observation, indeed, seems to favour the system of Godefroï; but I lay no great stress on the mere words [34]

(*v*) See pages 32, 73, 74, 149.

(*w*) Basilica, 2, 3, 23. See Demosth. 3 Phil. Reiske's edit. I. 112, 3. For *levissima culpa*, which occurs but once in the whole body of Roman law, *ῥαθυμία* seems the proper word in Greek; and it is actually so used in the Basilica, 60, 3, 5, where mention is made of the Aquilian law, in qua, says Ulpian, *et levissima culpa venit*. D. 9. 2. 44.

of the translation, as I cannot persuade myself that the Greek jurists under Basilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reasons, as, I hope, it has been proved, for rejecting all systems but that which Pothier has recommended and illustrated.

English law.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically, from the oldest Year-book or Treatise, to the latest adjudged case; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment, observing, at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case in which a man *possesses for a time the goods of another*: but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished; it will be sufficient to remark that the rules

[35]

are in general the same, by whatever means the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding (*x*), or in consequence of some distinct contract.

Lord Holt's division of bailments.

Sir John Holt, whom every Englishman should mention with respect, and from whom no English lawyer should venture to dissent without extreme diffidence, has taken a comprehensive view of this whole subject in

(*x*) Doct. & Stud. dial. 2. ch. 38; Lord Raym. 909. 917. See Ow. 141; 1 Leon. 224; 1 Cro. 219. Mulgrave & Ogden—*Post*, p. 52, n. (20).—T.

his judgment on a celebrated case (8) which shall soon be cited at length; but, highly as I venerate his deep learning and singular sagacity, I shall find myself constrained, in some few instances, to differ from him, and shall be presumptuous enough to offer a correction or two in part of the doctrine which he propounds in the course of his argument (*y*).

His division of bailments into six sorts appears, in the first place, a little inaccurate; for, in truth, his fifth sort is no more than a branch of his third, and he might, with equal reason, have added a seventh, since the fifth is capable of another subdivision. I acknowledge, therefore, but five (9) species of bailment, which I shall now enumerate and define, with all the Latin names, one or two of which Lord Holt has omitted. 1. *Depositum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum*, or *commission*, when the mandatary undertakes, without recompense, to *do some act* about the things bailed, or simply to *carry* them; and hence Sir Henry Finch divides bailment into *two* sorts, to *keep* and to *employ* (*z*). 3. *Commodatum*, or *loan for use*, when goods are bailed, without pay, to be *used* for a certain time by the bailee. 4. *Pignori acceptum*, when a thing is bailed by a debt-

[36]

New division
and definitions.

(y) Lord Raym. 912.

(z) Law, b. 2, ch. 18.

(8) *Coggs v. Bernard*, 2 Lord Raym. 909. See post. p. 58, and the case at full in the Appendix.

(9) Reducible, as has been seen, into three classes. 1. Those in which the trust is for the benefit of the bailor. 2. Those in which the trust is for the benefit of the bailee; and 3. Those in which the trust is for the benefit of both parties. The first embraces deposits and mandates; the second, gratuitous loans for use; and the third, pledges or pawns, and hiring and letting to hire.

or to his creditor in *pledge*, or as a security for the debt. 5. *Locatum*, or *hiring*, which is always for a *reward*; and this bailment is either, 1. *Locatio rei*, by which the hirer gains the temporary use of *the thing*, or, 2. *Locatio operis faciendi*, when *work and labour*, or *care and pains*, are to be performed or bestowed on the thing delivered, or, 3. *Locatio operis mercium vehendarum* (10), when goods are bailed for the purpose of being *carried* from place to place, either to a *public carrier*, or to a *private person*.

Law of deposits.

[37]
Bonion's case.

I. The most ancient case that I can find in our books on the doctrine of deposits (there were others, indeed, a few years earlier, which turned on points of pleading) was adjudged in the eighth of Edward II., and is abridged by Fitzherbert (a) It may be called *Bonion's case*, from the name of the plaintiff, and was, in substance, this:—An action of *detinue* was brought for *seals, plate, and jewels*, and the defendant pleaded, “that the plaintiff had bailed to him a chest *to be kept*, which chest was *locked*; that the bailor himself took away the *key*, *without informing the bailee of the contents*; that robbers came in the *night*, *broke open the defendant's*

(a) Mayn. Edw. II, 275. Fitz. Abr. tit. *Detinue*, 59.

(10) Following the civil law, Dr. Story divides hiring into *four* sorts. 1. The hiring of a thing for use (*locatio rei*). 2. The hiring of work and labour (*locatio operis faciendi*). 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiæ*). 4. The hiring of the carriage of goods (*locatio operis mercium vehendarum*) from one place to another. The three last are but subdivisions of the general head of hire of labour and services (*locatio operis*). Under the third division (*locatio custodiæ*), omitted by Sir W. Jones as a useless subdivision (Jones, 97), come the case of *agisters of cattle*, *warehousemen*, and *wharfingers*.

chamber, and carried off the chest into the fields, where they forced the lock, and took out the *contents*: that the defendant was robbed at the same time of his own goods." The plaintiff replied, "that the jewels were delivered, in a chest *not locked*, to be restored at the pleasure of the bailor;" and *on this* (11), it is said, *issue was joined*.

Upon this case Lord Holt observes, "that he cannot see why the bailee should not be charged with goods *in* a chest, as well as with goods *out of* a chest; for, says he, the bailee has as little power over them, as to any benefit that he might have from them, and as great power to defend them, in one case as in the other (*b*)."
The very learned judge was dissatisfied, we see, with Sir Edward Coke's reason, "that, when the jewels were locked up in a chest, the bailee was not, in fact, trusted with them (*c*)."
Now, there was a diversity of opinion upon this very point (12) among the greatest lawyers of

[38]

(b) Lord Raym. 914.

(c) 4 Rep. 84.

(11) This was the issue, according to the Year Book. According to Fitzherbert, the issue was "whether the goods were taken away by robbers." The former is clearly an immaterial issue, but not the latter; for, the bailee, being a mere depositary, was excused if the loss happened, as appeared from the plea to have been the case, from *contrivance* (it happened in the *night*) and *violence* (the thieves *broke open* the defendant's chamber). Burglary, in the opinion of Sir William Jones, excuses the depositary; and apparently also in the opinion of Dr. Story. The opinion seems warranted also by the judgment of the court in *Kettle v. Bromsall*, Willes, 121.

(12) Dr. Story observes, this question would, in our law, admit of different determinations, according to circumstances. If the bailee knew that the box or casket contained jewels, although the bailor took away the key, he would be bound to a degree of diligence proportioned to the contents. In other words, the same degree of care which would ordinarily be required to be taken of such valuables

Rome; for, "it was a question, whether, if a box sealed up had been deposited, the box only should be demanded in an action, or the clothes which it contained should also be specified; and Trebatius insists that the box only, not the particular contents of it, must be sued for, unless the things were previously shewn, and then deposited: but Labeo asserts that he who deposits the box deposits the contents of it; and ought, therefore, to demand the clothes themselves. What, then, if the depositary *was ignorant of the contents*? It seems to make no great difference, since he took the charge upon himself; and I am of opinion, says Ulpian, that, although the box was sealed up, yet an action may be brought for what it contained (*d*).” This relates chiefly to the form of the libel; but surely cases may be put in which

(*d*) D. 16. 3. 1. 41.

when deposited, would be exacted of him. If he had no ground to suppose that the box or casket contained any valuables whatsoever, he would be bound only to such reasonable care as would be required of depositaries in cases of articles of common value. And, under such circumstances, if he were guilty of gross negligence, he would be responsible for the loss, at least to the extent of what he might fairly presume to be the value of the contents. If, on the other hand, there was a meditated concealment of the contents of the box or casket from the bailee, with a view to induce him to receive the bailment, and he would not have received it, or have exposed it as he did, if he had been made acquainted with the facts, then the transaction would be deemed a fraud upon him; or, at least, the loss would be deemed one occasioned by the bailor's own folly or laches; and the bailee would not, even in a case of gross negligence, be responsible beyond the value of the box or casket itself, without the contents. The two first of these propositions may be deduced from the comments of Lord Holt in the case of *Coggs v. Bernard*. The last seems established by the prevailing doctrine of the common law in respect of carriers. (Story 54). See Appendix, CARRIERS.

the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought, *from their nature*, to be kept with peculiar care under lock and key; it would, therefore, be *gross* negligence in a depositary to leave such a deposit in an open antechamber, and *ordinary* neglect, at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the nature of things without knowing them; perhaps, therefore, it would be no more than *slight* neglect to leave out of a drawer a box or casket which was neither known nor could justly be suspected to contain diamonds; and Domat, who prefers the opinion of Trebatius, decides, "that, in such a case, the depositary would only be obliged to restore the casket, as it was delivered, without being responsible for the contents of it." I confess, however, that, anxiously as I wish on all occasions to see authorities respected and judgments holden sacred, *Bonion's* case appears to me wholly incomprehensible; for, the defendant, instead of having been *grossly* negligent (which alone could have exposed him to an action), seems to have used at least *ordinary* diligence; and, after all, the loss was occasioned by a *burglary*, for which no bailee can be responsible without a *very* special undertaking (13).

[39]

(13) To what extent a special agreement, framed in general terms, varies the obligations of the bailee, is a question involved in all cases at present in great uncertainty. The general rule, says Dr. Story, would seem to be, not to expound the contract unfavourably to the bailee beyond the obvious scope of its terms. Sir W. Jones thinks that a depositary would not be liable for a loss of goods by *robbery*, without a most express agreement. (*Jones*, 44). St. German also holds, that, if a depositary promise to restore the goods *safe*, at his peril, he is not responsible for casualties; but it would be otherwise if he is to receive a reward. (*Doct. & Stud. Dial.* 2, ch. 38). Lord

The plea, therefore, in this case, was good, and the replication idle; nor could I ever help suspecting a mis-

Holt, in *Coggs v. Bernard*, (2 Lord Raym. 909, 915, 918), was of opinion, that, upon a promise by a bailee without reward to keep or carry *safely*, he is not responsible for injuries or losses occasioned by the acts of *wrong-doers*; and, *à fortiori*, that he is not responsible for a theft not caused by his own neglect. Robbery would, of course, in his opinion, exempt him from liability. Mr. Justice Powell, in the same case, thought that robbery would not be an excuse, and of course that theft would not, because the bailee would have a remedy over against the robber. Mr. Justice Powys and Mr. Justice Gould seem to have agreed with Lord Holt. Sir W. Jones holds, that, in such a case, the bailee would be responsible for a loss by *theft*, but not for a loss by *robbery*. He founds himself manifestly upon the distinction taken in the civil law, that the attack of robbers is an irresistible force; but that of thieves may be guarded against by vigilance. Lord Chief Justice Willes, however, seems to have thought, that, upon such a special undertaking, even robbery would not be an excuse. (*Kettle v. Bromsall*, Willes, 121). The civil law would make the bailee liable upon such a contract in case of theft, but not of robbery.

In respect to losses occasioned by inevitable accident, as, by lightning, tempests, inundations, &c., there are very respectable authorities, that, notwithstanding a special contract or undertaking to keep *safely*, the bailee will not be responsible for losses. Sir W. Jones manifestly supports this doctrine. It is sanctioned also by St. German in the passage above cited; and was avowed by the Court in *Coggs v. Bernard*. There are many cases in our law, where, if a contract or condition, possible at the time it was made, become afterwards impossible, by the act of God, or of the law, the obligation or condition is discharged. (Com. Dig. Condition, D. 1. L. 12, 13. Co. Litt. 206. 1 Roll. Abr. Condition, I. Com. Dig. Assumpsit, G. Bac. Abr. Condition, D. 1, 2). There are others, again, where a different doctrine is inculcated. (1 Roll. Abr. Condition, G. 8, 9, 10. Com. Dig. Assumpsit, G. 2 Saund. R. 422, note (2). 6 T. R. 750). It is not easy to reconcile the cases, or to point out the different reasonings on which they proceed. In Aleyne's Reports, 27, this distinction is taken:—"Where the law creates a duty

take in the last words, *alii quod non*; although Richard de Winchedon, or whoever was the compiler of the table to this Year-Book, makes a distinction, that, "if jewels be bailed to me, and *I put them* into a casket, and *thieves rob me of them in the night-time*, I am answerable; not if they be *delivered* to me in a chest *sealed up*:" which could never have been law; for, the next oldest case, in the book of Assise, contains the opinion of Chief Justice Thorpe, that "a general bailee to *keep* is not responsible, *if the goods be stolen*, without his *gross neglect (e)*:" and it appears, indeed, from Fitzherbert, that the party was driven to this issue, "whether the goods were taken away by *robbers*."

[40]

By the Mosaic institutions, "if a man delivered to his neighbour *money or stuff to keep*, and it was *stolen* out of his house, and the thief could not be found, the master of the house was to be brought before the judge, and to be discharged, if he could swear that he had not *put his hand* unto his neighbour's goods (*f*)," or, as the

Mosaic laws.

(e) 29 Ass. 28. Bro. Abr. tit. Bailment, pl. 7. (f) Exod. xxii. 7, 8.

or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because, he might have provided against it by his contract." This distinction has the countenance of highly respectable authorities. (6 T. R. 750. Hadley v. Clarke, 8 T. R. 259, 267). But, in the present state of the law, it does not seem possible to lay down any general rule on the subject, as to what casualties will excuse in cases of a special contract. The general rule of the civil law would seem to be, that the risk of casualties is never included under the general terms of a contract. And, however general the undertaking may be, it includes only such risks as might be foreseen, and not those which there could be no room to apprehend. The code of France adopts into its positive regulations most, if not all the rules of the civil law on this subject. (Story 23).

[41]

Roman author of the *Lex Dei* translates it, *nihil se nequiter gessisse* (*g*): but a distinction seems to have been made between a stealing by *day* and a stealing by *night* (*h*); and "if *cattle* were bailed and stolen (by *day*, I presume), the person who had the care of them was bound to make restitution to the owner (*i*);" for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge* (14): now, sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that, when Jacob, who was, for a long time at least, a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, Laban made him answer for them "whether stolen by day or stolen by night (*k*)."

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir Edward Coke in his reports, and afterwards deliberately inserted in his *Commentary on Littleton*, the great result of all his experience and learning; namely, "that a depositary is responsible, if the goods be stolen from him, unless he accept them specially *to keep as his own*;" whence he advises all depositaries to make such a special acceptance (*l*). This opinion, so repugnant to natural reason and the laws of all other nations, he grounded partly on some broken cases in the *Year-Books*, mere conversations on the bench, or loose

(*g*) Lib. 10. De Deposito. This book is printed in the same volume with the Theodosian Code. Paris, 1586.

(*h*) Gen. xxxi. 39.

(*i*) Exod. xxii. 12.

(*k*) Gen. xxxi. 39.

(*l*) 4 Rep. 83 b. 1 Inst. 89 a, b.

(14) For a correction of this opinion as to the degree of diligence required of the *mandatary*, see post, n. 22.

arguments at the bar; and partly on *Southcote's case*, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained, I shall offer a few remarks on the pleadings in the cause, and the judgment given on them.

Southcote declared in detinue, that he had delivered goods to Bennet, *to be by him safely kept*: the defendant confessed *such* delivery, but pleaded in bar, that a certain person *stole* them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a *servant* of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. "The reason of the judgment," says Lord Coke, "was, because the plaintiff had delivered the goods to be *safely* kept, and the defendant had taken the charge of them upon himself, by accepting them on *such* a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit which has occasioned so many reflections on the case itself; namely, "that to keep and *to keep safely* are one and the same thing;" a notion which was denied to be law by the whole court in the time of Chief Justice Holt (*m*), (15).

Southcote's
case.

[42]

(*m*) Ld. Raym. 911, margin.

(15) If the opinion, that an undertaking to keep and to keep safely are one and the same thing, may be treated as a mere conceit of Lord Coke individually, Southcote's case would not be liable to objections. Like *Coggs v. Bernard*, it would be a case in which the responsibility of the bailee was enlarged in virtue of his special undertaking. If on the contrary, it was the opinion of the court, then the case is not good law, but is open to two objections—first, the objection to such

It is far from my intent to speak in derogation of the great commentator on Littleton; since it may truly be asserted of him, as Quintilian said of Cicero, that *an admiration of his works is a sure mark of some proficiency in the study of the law*; but it must be allowed that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them.

[43]

The pleader who drew the replication in *Southcote's* case, must have entertained an idea that the *blame was greater*, if a *servant* of the depositary stole the goods, than if a mere *stranger* had purloined them: since, the defendant ought to have been more on his guard against a person who had so many opportunities of stealing; and it was his own fault, if he gave those opportunities to a man of whose honesty he was not morally certain: the court, we find, rejected this distinction; and also held the replication informal, but agreed that no advantage could be taken on a *general* demurrer of such informality, and gave judgment on the substantial badness of the plea (n). If the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, "that, although a *general*

(n) 1 Cro. 815.

an interpretation of the agreement—and secondly, to the principle of the decision upon the assumed interpretation; for, the defendant being a bailee without reward, according to the best authorities of our own law, as well as the civil law, he was not liable under the circumstances, unless his contract was special. In *Kettle v. Bromsall*, Willes 121, upon a bailment of goods to be *kept safely*, it was held that the defendant was liable though the goods were taken from him feloniously. The decision turned upon the special terms of the undertaking; and the court said, that, had the goods been accepted merely to be taken care of as the defendant's own goods, he would not have been liable.

bailee to *keep* be responsible for *gross* neglect *only*, yet Bennet had, by a *special* acceptance, made himself answerable for *ordinary* neglect at least; that it was *ordinary* neglect to let the goods be *stolen* (16) out of his

(16) That a loss by private theft is presumptive evidence of ordinary neglect, a proposition asserted more than once in the course of this essay (pp. 76, 119), is an established tenet of the civil law; but Dr. Story has taken considerable pains to prove that the common law warrants no such presumption. "Abstractedly speaking," says he, "there is nothing in the case of theft from which we have a right to infer, that, because a loss has happened by it, there must have been some neglect (Vere v. Smith, 1 Vent. 121; S. C. 2 Lev. 3). On the contrary, no degree of vigilance will always secure a party from losses by theft. A store may be broken open however securely locked; a person may be robbed while riding in a stage-coach, or while asleep; a servant may be faithless, and betray the confidence reposed in him; a person may be seized with a sudden fit, or alienation of mind, and the theft committed without any consciousness on his part. In these and in many other cases there would not be any presumption of neglect. And the civil law itself supposes, that, in such cases, the bailee might repel the imputation of negligence. By our law, in many cases, a bailee is excusable when the loss is by theft; but never when that theft is occasioned by gross negligence. So long ago as the reign of Edward the Third (29 Assisarum, 28), it was held, that, if a person bail his goods to keep, and they are stolen, he is excused. The reasoning of the court in *Coggs v. Bernard* shews that the court did not consider theft as *prima facie* presumptive of negligence. In short, our law considers theft, like any other loss, to depend for its validity as a defence upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It neither imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility from that fact alone. But it decides upon all the circumstances, as leading to the conclusion that there has or has not been a due degree of care used." *Finucane v. Small*, 1 Esp. N. P. C. 315. Story, 27.

Now, it may be observed, that the concluding remark, which is a summary of the argument preceding it, expresses Sir W. Jones's

[44]

possession, and he had not averred that they were stolen *without his default*; that he ought to have put them into a *safe* place, according to his undertaking, and have kept the key of it himself; that the *special* bailee was reduced to the class of a *conductor operis*, or a workman *for hire*; and that a tailor, to whom his employer has delivered lace for a suit of clothes, is bound, if the lace be *stolen*, to restore the value of it (o).” This reasoning would not have been just, if the bailee had pleaded, as in *Bonion’s* case, that he had been *robbed by violence*, for, no degree of *care* can, in general, prevent an open robbery: *impetus prædonum*, says Ulpian, *à nullo præstantur*.

Mr. Justice Powell, speaking of *Southcote’s* case,

(o) “*Alia est furti ratio; id enim non casui, sed levi culpæ, ferme ascribitur.*” Gothofr. Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where, says the annotator, “*Adversus latrones parum prodest custodia; adversus furem prodesse potest, si quis adviliget.*” See also Poth. *Contrat de Louage*, n. 429. and *Contrat de Pret à Usage*, n. 53. So, by Justice Cottessmore, “*Si jeo grante byens a un home a garder a mon oepe, si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mez s’il soit robbe de mesmes les byens, il est excusable per le ley.*” 10 Hen. VI. 21.

opinion, with which also the whole argument so well agrees that it is difficult to discover any difference between them. The difference, if any, is at most merely formal. Sir W. Jones no where represents theft so presumptive of neglect as to exclude evidence to rebut the presumption. He evidently considers it as a mere *presumptio juris*, not *presumptio juris et de jure*: and, what more is that than saying that theft shall not avail a bailee as a defence without some explanation of the circumstances under which it happened? Nor, seemingly, would Dr. Story allow it to be a defence, if it happened through the default of the bailee, or through his own negligence. The difference, therefore, seems to turn merely on this, that Sir W. Jones would disallow the plea, unless, in addition to the allegation of the theft, it negatived the suspicion of default or negligence. I venture to think this the better opinion, according to the principles of special pleading.

which he denies to be law, admits, that "if a man *does* undertake *specially* to keep goods *safely*, that is a warranty, and will oblige the bailee to keep them safely against perils where *he has a remedy over*, but *not* against those where he has *no* remedy over (*p*).^(p) One is unwilling to suppose that this learned judge had not read Lord Coke's report with attention; yet the case which he puts is precisely that which he opposes; for, Bennet *did* undertake "to keep the goods *safely*:" and, with submission, *the degree of care demanded*, not *the remedy over*, is the true measure of the obligation; for, the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against *robbers* without a most express agreement (*q*). This, I apprehend, is all that was meant by St. German, when he says, "that, if a man *have nothing* for keeping the goods bailed, and promise, at the time of the delivery, to restore them *safe at his peril*, he is not responsible for *mere casualties* (*r*);" but the rule extracted from this passage, that a *special* acceptance to *keep safely* will not charge the bailee against the acts of *wrong-doers* (*s*)," to which purport *Hobart* also and *Croke* are cited, is too general, and must be confined to acts of *violence*.

[45]

I cannot leave this point without remarking, that a *tenant at will*, whose interest, when he has it rent-free, the Romans called *precarium*, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit *only*, yet he has an *interest* in the land till the will is determined, "and, our law adds, it is the folly of the lessor if he do not restrain him by a special con-

(p) *Ld. Raym.* 912.(q) 2 *Sho.* pl. 166.(r) *Doct. and Stud. dial.* 2. chap. 38.(s) *Com.* 135. *Ld. Raym.* 915.

[46]

dition:" thence it was adjudged, in the *Countess of Shrewsbury's* case, "that an action will not lie against a tenant at will *generally*, if the house be burned through his neglect (*t*); but, says Justice Powell, "had the action been founded on a *special* undertaking, as that, in consideration that the lessor would let him live in the house, he would deliver it up *in as good repair as it then was in*, such an action would have been maintainable (*u*)."

Rules and exceptions.

It being then established that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself a *careless and inattentive* man; a question may arise, whether, if proof be given that he is in truth very *thoughtful and vigilant in his own concerns*, he is not bound to restitution, if the deposit be lost through his neglect, either *ordinary* or *slight*; and it seems easy to support the affirmative; since, in this case, the measure of diligence is *that which the bailee uses in his own affairs* (17). It must, however,

(*t*) 5 Rep. 13 b.

(*u*) Ld. Raym. 911.

(17) It is often laid down in our books, and Sir W. Jones seems here to recognize the doctrine, that the depositary is bound to take the same care of the deposited goods as he takes of his own: and it is thence deduced, as a corollary, that, if he commits a gross neglect in regard to his own goods as well as in regard to those bailed, by which both are lost, he is not liable, and the depositor must impute it to his own folly to have trusted so improvident a person. Sir W. Jones, in his commentary on the case of *Mytton v. Cock* (Jones, 122, 123), so states the doctrine. Bracton, Lib. 3, 99 b, lays down the same rule. In this he does no more than copy the very words of the *Institutes* (Just. Inst. Lib. 3, tit 15, s. 3); and he is supported by the clear result of the *Pandects* (Dig. Lib. 16, tit. 3,

be confessed, that the character of the individual depositary can hardly be an object of judicial discussion: if he

l. 32; Domat. Lib. 1, tit. 7, s. 3, n. 2). Lord Holt, too, has given the doctrine the authority of his own great name (*Coggs v. Bernard*, 2 Ld. Raym. 909). Pothier implicitly adopts it, (*Pothier, Traité de Dépôt*, ch. 2, s. 1, art. 1. n. 27); and in America he is followed by Mr. Chancellor Kent, and other learned judges. See also *Gibbon v. Paynton*, 4 Burr. 2298.

Notwithstanding the weight of these authorities, they seem not to express the general rule in its true meaning. The depositary is, as has been seen, bound to slight diligence only; and the measure of that diligence is that degree which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractedly considered, has no reference to the character of the individual, but looks to that which belongs to the whole class of persons; and so Sir William Jones has intimated upon some occasions.

Cases may, indeed, occur in which the character of the individual may be important, for the purpose, not of furnishing a general rule, but an exception to that rule. (*The William*, 6 Rob. 316.) As, if the depositor should knowingly trust his diamonds or other valuables with a man notoriously weak and infirm in judgment, or to a minor without any experience or discretion, or to a man subject to an absence of mind bordering on derangement, or to a person given to habitual intoxication; and from these known infirmities the thing bailed should innocently be lost; there might be strong ground to presume that the depositor was content to trust the party, with all his faults and infirmities, and to take upon himself the responsibility of all losses not arising from actual fraud. At least, it might fairly be left to the jury to presume a special contract in such a case, that the depositary should take the same care as he did of his own property, and that he should not be responsible except for fraud. (*The William*, 6 Rob. 316). But these cases do not impugn the general rule. They turn upon circumstances which imply a waiver of it, or a substitution of a different contract.

The doctrine here stated has also the sanction of adjudged cases in its support. Thus, where a gratuitous bailee put a horse of his brother into a pasture with his own cattle in the night time, and, by rea-

be *slightly* or even *ordinarily* negligent in keeping the goods deposited, the favourable presumption is that he

son of a defect of fences, the horse fell into a neighbouring field and was killed; it was thought that he was responsible to the owner, because it was gross negligence to put the horse into a dangerous pasture to which he was unused. (*Rooth v. Wilson*, 1 B. & Ald. 59). The true way of putting cases of this nature is, to consider whether the party has omitted that care which bailees without reward usually are understood to take of property of the like nature. Therefore, where a person had a deposit of money, and put it with his own in a valise on board a steam boat, and left it there in an exposed situation all night, and it was stolen, and his own money was left, he was held responsible for gross negligence. But, if he had left it for a moment only, under ordinary circumstances, and no danger pressing, it would have been otherwise. (An American case). Lord Stowell, in a case of justifiable capture, where the captors are held responsible for due (that is for reasonable) diligence, has expressed himself with great clearness on this subject. "On questions of this nature," says he, "there is one position sometimes advanced which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such a case; for, a man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might indeed be considered as a reasonable criterion." (*The William*, 6 Rob. 316). Certainly it might, if such character was known, and the party, under the circumstances, might be presumed to rely, not on the rule of law, but on the care which the party was accustomed to take of his own property, in making the deposit. But, unless he knew the habits of the bailee, or could fairly be presumed to trust to such care as the bailee might use about his own property of a like nature, there is no ground to say that he has waived his right to demand reasonable diligence.

is equally neglectful of his own property; but this presumption, like all others, may be repelled; and, if it be proved, for instance, that, his house being on fire, he saved his own goods, and, having time and power to save also those deposited, suffered them to be burned, he shall restore the worth of them to the owner (*w*). If, indeed, he have time to save only one of two chests, and one be a deposit, the other his own property, he may justly prefer his own; unless that contain things of small comparative value, and the other be full of much more precious goods, as, fine linen or silks; in which case he ought to save the more valuable chest, and has a right

[47]

(*w*) Poth. Contrat de Depot, n. 29. Stiernh. de Jure Sueon. l. 2, c. 5.

Lord Coke has adopted a rule somewhat different. In his Institutes, he says, that, in cases of deposit, the engagement of the bailee is, to keep safely; for, if goods are delivered to one to be kept, and safely kept, it is all one in law. (Co. Lit. 89. b). Hence, he concludes, that, if goods are delivered to a man to be safely kept, and afterwards these goods are stolen, this shall not excuse him, because, by the acceptance, he undertook to keep them safely, and therefore he must keep them at his own peril. But, if the goods are delivered to him to keep as he would keep his own, then, if they are stolen from him without his default or negligence, he shall be discharged. And he recommends, on this account, to those who receive goods, that they should receive them in a special manner, viz. to keep as their own, or at the peril of the owner. Lord Coke considered this as the settled law in his time; and he mainly relies for its support on Southcote's case (4 Rep. 83 b, 84; Jones, 42). The general doctrine of Lord Coke, that, if a man accepts goods to keep as his own, he is not responsible for losses by theft, is confirmed by later authorities. It is treated, however, as he treats it, not as an undertaking resulting from the general law of deposits, but as a special undertaking, and limiting the common responsibility. See *Kettle v. Bromsall*, Willes, 118; *Coggs v. Bernard*, 2 Ld. Raym. 909—Mr. Justice Powell's opinion. Story, 42.

to claim indemnification from the depositor for the loss of his own. Still further, if he commit even a *gross* neglect in regard to his own goods *as well as* those bailed, by which *both* are lost or damaged, *he cannot be said to have violated good faith*, and the bailor must impute to his own folly the confidence which he reposed in so improvident and thoughtless a person (*x*).

To this principle, that a depositary is answerable *only* for *gross* negligence, there are some exceptions.

[48] First, as in *Southcote's* case, where the bailee, by a *special* agreement, has engaged to answer for less: "Si quid nominatim convenit," says the Roman lawyer, "vel plus vel minus in singulis contractibus, hoc servabitur quod initio convenit; legem enim contractui dedit (*y*);" but the opinion of Celsus, that an agreement *to dispense with deceit* is void, as being contrary to good morals and decency, has the assent both of Ulpian and our English courts (*z*).

Secondly, when a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance*; for which reason *he takes upon himself*, according to Julian, *the risk of the deposit, and becomes responsible at least for ordinary neglect, but not for mere casualties* (*a*), (18).

(*x*) Bract. 99, b. Justin. Inst. l. 3, tit. 15.

(*y*) L. Contractus, 23. D. de reg. jur. (*z*) Doct. & Stud. dial. 2, ch. 38.

(*a*) D. 16. 3. 1. 35.

(18) Such, Dr. Story observes, was certainly the rule of the civil law; but, though stated to be a rule of our law also, no authority to that effect has been cited. The rule is certainly one strictissimi juris, and its incorporation into our law ought not readily to be ad-

Where things are deposited through necessity on any sudden emergence, as a fire, or a shipwreck, M. Le Brun insists, "that the depositary must answer for *less than gross* neglect, how careless soever he may be in his own affairs; since the preceding remark that *a man who reposes confidence in an improvident person must impute any loss to his own folly*, is inapplicable to a case where the deposit was not optional; and the *law ceases with*

mitted. A voluntary offer of kindness to a friend, even when importunately urged, ought hardly to carry with it such penal consequences; since it is generally the result of strong affection, a desire to oblige, and often of a sense of duty, especially in cases of imminent peril or sudden emergency. The reason assigned for the rule is not satisfactory. It might, with at least as much force, be said, that he who trusts such a deposit to a friend at his urgent request, confides it to him as a proof of his personal confidence, and requires no more than that he should guard it as he guards his own, or at least as men ordinarily guard deposits. He does not mean to place a burthen on his friend, by which extraordinary responsibility is to be incurred; but to manifest a personal confidence in the character and caution of his friend. Sir W. Jones has himself quoted, with apparent approbation, the opinion of Labeo in the stronger case of a *negotiorum gestor*,* in which Labeo requires no more than good faith of him when he interferes officiously, but from pure kindness, to act in my affairs; *affectione coactus, ne bona mea distrahantur, negotiis se meis obtulerit*. The good sense of this as a general rule, interpreting the offer of the party in its fair intentment, would seem more to belong to the manliness of the common law, than the rule promulgated by Julian, even with all the authority of imperial wisdom." (Story, 58).

* The *negotiorum gestor* in the civil law is one who spontaneously, and without authority, undertakes to act for another, during his absence, in his affairs. Of course, as his acts are wholly without the assent of the owner, the case is much stronger than that of a depositary, who officiously interposes in another's affairs with his consent.

[49] *the reason of it (b);*" but that is not the *only* reason; and, though it is an additional misfortune for a man in extreme haste and deep distress to light upon a stupid or inattentive depositary, yet I can hardly persuade myself that more than perfect *good faith* is demanded in this case, although a violation of that faith be certainly more criminal than in other cases, and was therefore punished at Rome by a forfeiture of the double value of the goods deposited.

In these circumstances, however, a benevolent *offer* of keeping another's property for a time, would not, I think, bring the case within Julian's rule before mentioned, so as to make the person offering answerable for *slight*, or even *ordinary* negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than *good faith* of a *negotiorum gestor*, when "affectione coactus, ne bona mea distrahantur, negotiis se meis obtulerit."

[50] Thirdly, when the bailee, improperly called a *depositary*, either *directly* demands and receives a reward for *his care*, or takes the charge of goods in consequence of some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and *lets out* his mental labour at a just price; thus, when clothes are left with a man who is paid for the use of his bath; or a trunk with an inn-keeper or his servants, or with a ferryman; the bailees are as much bound to indemnify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompence for *their attention and pains*: but of this more fully, when we come to the article of *hiring*.

(b) De la Prestation des Fautes, p. 77.

Fourthly, when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower until the event happens, because the owner, perhaps, is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit, in whatever light it may be considered by the parties. Suppose, for example, that Charles, intending to appear at a masked ball expected to be given on a future night, requests George to lend him a dress and jewels for that purpose, and that George, being obliged to go immediately into the country, desires Charles to keep the dress till his return, and, if the ball be given in the mean time, to wear it; this seems to be a regular *loan*, although the original purpose of borrowing be future and contingent (19).

Since, therefore, the two last cases are not in strict propriety *deposits*, the exceptions to the general rule are reduced to two only; and the second of them, I conceive,

(19) In general, it may be laid down that a depositary has no right to use the thing deposited. (Bac. Abr. Bailm. D). But there are cases in which the use of the thing may be necessary for the due preservation of the deposit; and there are other cases in which the use would be, if not beneficial, at least indifferent. There are cases also, in which it would be mischievous. As, therefore, every case must be governed by its own particular circumstances, it has been suggested, that the best general rule on the subject is, to consider whether there may or may not be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to its injury, or if perilous, it ought not to be presumed; if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable. Without either the express or presumed permission of the depositor, the depositary cannot make use of the thing deposited.

will not be rejected by the English lawyer, although I recollect no decision or dictum exactly conformable to the opinion of Julian.

[51] Clearly as the obligation to *restore* a deposit flows from the nature and definition of this contract, yet, in the reign of Elizabeth, when it had been adjudged, consistently with common sense and common honesty, "that an action on the case lay against a man who had not performed his promise of re-delivering, or delivering over, things bailed to him," that judgment was *reversed*; and, in the sixth year of James, judgment for the plaintiff was arrested in a case exactly similar (*c*); it is no wonder that the profession *grumbled*, as Lord Holt says, at so absurd a reversal; which was itself most justly reversed a few years after, and the first decision solemnly established (*d*).

Grecian and
Arabian laws.

Among the curious remains of Attic law which philologists have collected, very little relates to the contracts which are the subject of this essay; but I remember to have read of Demosthenes, that he was advocate for a person with whom *three* men had deposited some valuable utensil of which they were joint-owners; and the depositary had delivered it to *one* of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence that there was a *third* bailor whom they had not joined in the suit; for, the truth not being proved, Demosthenes insisted, *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it*; and this doctrine was good at Rome as well as at Athens, when the thing deposited was in its

[52]

(c) Yelv. 4, 50, 128.

(d) 2 Cro. 667. Wheatley v. Low.

nature incapable of partition: it is also law, I apprehend, in Westminster-hall (e), (20).

The obligation to return a deposit faithfully, was, in very early times, holden sacred by the Greeks, as we learn from the story of Glaucus, who, on consulting the oracle, received his answer, "that it was criminal even *to harbour a thought* of withholding deposited goods from the owners, who claimed them (f);" and a fine application of this *universal* law is made by an Arabian poet contemporary with Justinian, who remarks, "that

(e) D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

(f) Herod. VI. 86. Juv. Sat. XIII. 199.

(20) Generally speaking, the bailee is not bound to re-deliver the deposit without the consent of all the parties to the bailment. But this rule applies in strictness to those cases only where the bailment has been joint, and not where the interest in the deposit is joint, but there has been a delivery by one of the joint owners, without any consent or privity of the other owners. (*May v. Harvey*, 13 East, 197). In cases of joint deposit, where there are many owners, and the depositary is one, it seems, that, if either of the other owners gets the deposit out of his possession against his will, he is remediless; for, it has been decided, that, in such a case, he cannot recover back the deposit, although the delivery is upon a special trust for all the owners, and although he has given a bond for the safe custody of it. (*Holliday v. Camsell*, 1 T. R. 658). Of this last decision it has been remarked, that, if it is correct, it is full of hardship and inconvenience. It is full of hardship, for it takes away from the depositary the means of preserving his exclusive possession and safe custody, and yet does not seem to exonerate him from responsibility for such safe custody under his bond. It is full of inconvenience, for it disables joint owners, in case of any personal distrust, from protecting their several rights by a mutual deposit for the benefit of all, in the custody of one enjoying the respect and confidence of all. It enables one owner, in violation of his contract, by fraud and stratagem, to put at hazard the joint property, or even to apply it to purposes wholly against the object for which it is held. (*Story*. 87).

life and wealth are only *deposited* with us by our Creator, and, *like all other deposits*, must in due time be restored." (21).

(21) *Of quasi deposits.*]—There is a kind of deposit which may, for distinction's sake, be called a *quasi* deposit, which is governed by the same rule as common deposits. It is where a party comes lawfully to the possession of another person's property by finding. Under such circumstances, the finder seems bound to the same reasonable care of it as any voluntary depositary *ex contractu*. St. German says, (Doct. & Stud. Dial. 2, ch. 38), "If a man finds goods of another, if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But, if they be lost by other casualty, as, if they be laid in a house that by chance is burned, or, if he deliver them to another to keep that runneth away with them, I think he be discharged." In *Isaac v. Clarke* (2 Bulst. 306, 312; S. C. 1 Roll. R. 125, 130), Lord Coke deliberately declared, that, "if a man finds goods, an action on the case lies for his negligent keeping of them, but not trover or conversion, because this is but a nonfeasance. And this seems the true doctrine of the law; for, though a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner, yet, when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods. And the least degree of care known to our law, that is, slight diligence, may well be required of him, being that which is applied to gratuitous acts of kindness. This is conformable to the rule above cited from the Doctor and Student, and seems incidentally recognized in other authorities. So that there seems no just foundation in our law for any distinction as to responsibility, though there may be as to remedy, between cases of conversion and misfeasance of the finder of goods, and cases of negligence, if the loss has arisen from that degree of negligence for which gratuitous bailees would be ordinarily liable.* (Story 61).

* *Contra*. Bac. Abr. Bailment, D. But the law of bailments was not so well defined at the time of the cases referred to in Bacon as at present; and therefore they would be entitled to less weight than is usually given to judicial determinations, even if they stood without any contradiction.

II. Employment by *commission* was also known to our ancient lawyers; and Bracton, the best writer of them all, expresses it by the Roman word, *mandatum*; now, as the very essence of this contract is, the *gratuitous* performance of it by the bailee, and, as the term *commission* is also pretty generally applied to bailees who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word *mandate* as appropriated in a *limited sense* to the species of bailment now before us; nor will any confusion arise from the common acceptance of the word in the sense of a judicial command or precept, which is, in truth, only a *secondary* and inaccurate usage of it. The great distinction, then, between one sort of *mandate* and a *deposit*, is, that the former *lies in fessance*, and the latter, simply *in custody* (22): whence, as we have already intimated, a difference.

Law of mandates.

[53]

(22) Philosophically speaking, it may be doubted whether the above distinction exists. In cases of deposit something almost always remains to be done, besides a mere passive custody. If the deposit is perishable, labour must be performed to keep it in proper order. If it is a living animal, as, a horse, suitable food and exercise must be given to it. And these may properly be said to lie in fessance. In the next place, in mandates there is commonly custody; the possession of the thing being generally indispensable to the performance of the act intended by the parties. So that, in each contract, there is custody, and labour, and service to be performed. The true distinction between them is, that, in the case of a deposit, the principal object of the parties is the custody of the thing, and the service and the labour are merely accessorial; in the case of a mandate, the services and labour are the principal objects of the parties, and the custody of the thing is merely accessorial. The distribution of the subject into different heads may, on this account, not be unjustifiable. (Story, 103).

Of the interest of the bailee in the goods bailed.—It is often, says Dr. Story, laid down in our books, that a depositary has

rence often arises between the degrees of care demanded in the one contract and in the other; for, the mandatory

a special property in the deposit. There is no doubt that, in certain kinds of bailment, the bailee has a special property; but that he possesses it in a case of mere deposit, is a matter of serious doubt. Blackstone, in his Commentaries (Vol. 2, p. 452), lays down the doctrine as follows: "In all these instances (*i. e.* in all classes of bailment), there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a chose in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may, as well as the bailor, maintain an action against such as injure or take away the chattels." For the full extent of this proposition, he mainly relies on Heydon and Smith's case (13 Rep. 67, 69), which certainly does not support it. Sir W. Jones also lays down the doctrine in equally general terms; "for," says he, "every bailee has a temporary qualified property in the things of which possession is delivered to him; and has, therefore, a possessory action, or an appeal in his own name, against a stranger who may damage or purloin them." And for this he relies on a case in the Year-Books (21 Hen. 7, 14 b.), which it must be admitted seems full to the point. Mr. Justice Fineux there said (and it was an action of replevin brought by a bailee, for aught that appears, upon a general bailment)—"In this case the bailee has a property in the thing against a stranger, for he is chargeable to the bailor; and for this reason he shall recover against a stranger who takes the goods out of his possession." And judgment was accordingly given for the plaintiff. Now, an action of replevin will lie only where the party has a general or a special property in the thing. (Co. Litt. 145. b. Com. Dig. Replevin, B.). There can be no doubt that if the bailee in that case was a pawnee or factor, he might maintain the action. What sort of bailee he was, does not appear in the report. There are other cases which hint at the same doctrine as that in the Year-Books. (*Rich v. Aldred*, 6 Mod. 216. 2 Ld. Raym. 912, per Powell, J. 2 Saund. 47 b, note. *Holliday v. Cam-sell*, 1 T. R. 658. 2 Black. Com. 451, 452, 453). But the doctrine generally maintained by the better authorities is, that a depositary

being considered as having engaged himself to use *a degree of diligence and attention adequate to the perform-*

has no property whatsoever in the deposit, but a custody only. It was so adjudged, upon very full consideration, by the court, in *Hartop v. Hoare* (3 Atk. 49), where the point was directly in judgment; and *Southcote's case* (4 Co. 83, 84) was relied on as supporting it. There is nothing in the case of *Sutton v. Buck* (2 Taunt. R. 301), which, properly considered, affects that decision. There, a party who was the purchaser of a ship and had taken possession, but whose title was not completed by any proper registry, or by any regular conveyance, sued in trover for the recovery of certain portions of the ship against a wrong-doer, by whom he had been dispossessed; and it was held that he was entitled to recover against the defendant. The ground of the opinion was, that his possession alone, under such circumstances, was a good title against a mere wrong-doer. The doctrine of that case has been since affirmed, and it has been held that a simple or naked bailee has a sufficient interest to sue in trover. (*Burton v. Hughes*, 9 Moore, 334; 2 Bing. 173. See also *Oughton v. Seppings*, 1 B. & Adol. 241; and 2 Saund. R. 47 a, 47 b, and note). Indeed, the like doctrine was held by Lord Coke as long ago as the case of *Isaac v. Clarke* (2 Bulst. R. 306, 311), where, in delivering his opinion as Chief Justice, he said: "Bailment makes a privity. If one hath goods as a bailee where he hath only a possession, and no property, yet he shall have an action for them." The case of *Rooth v. Wilson* (1 B. & Ald. 59) goes no further, and only shews that the depositary may maintain an action for any wrong done to the deposit for which he is responsible, but not that a special property passes to him. Such a right of action may exist without a special property in the thing. (Bac. Abr. Bailment, D., cites 13 Co. Rep. 69). There is, however, a very recent case, arising out of another class of gratuitous bailments, which seems somewhat at variance with the doctrine here spoken of, and which may perhaps be thought to admit of some question in point of principle. A person was entrusted with a parcel containing a bank note, for the purpose of having it booked, to go by a common coach to London. Instead of doing so, being himself about to go to London by the same coach, he put it into his own bag. The bag was stolen by some of the servants of the

ance of his undertaking, the omission of such diligence may be, according to the nature of the business, either

coach owner in the course of the journey. An action was brought by the passenger against the coach owner for the loss of his bag and its contents, and, among other things, of the packet so entrusted to him. But the Court held, that no recovery in damages could be had by him in that action for the loss of such parcel, although he was responsible over to the owner of it. The ground of the decision seems to have been, that, as the delivery to the party was for a special purpose which was not complied with, he had neither a general nor a special property in the parcel, and therefore was not entitled to recover damages, notwithstanding by his misconduct he had become responsible to the bailor. (*Miles v. Cattle*, 4 Moore & P. 630; 6 Bing. 743).

There is no doubt, however, that, notwithstanding a deposit, the general owner may, upon the ground of his general ownership, maintain a suit against strangers for any injury or conversion of it. (2 Bla. Com. 453. Bac. Abr. Bailment, A., B., C. Id. Trespass, C., Trover, C.) In such a case, a recovery by him will bar any redress by the depositary, even when, by reason of his responsibility over, he might otherwise be entitled to an action for the same injury or conversion. (Bac. Abr. Bailment, A., B., C.) (Story, 71).

To whom restitution is to be made].—Generally speaking, says Dr. Story, restitution is to be made to the bailor, though there may be special cases in which that would not be required or justified. As, for instance, if goods have been deposited by a thief who has been convicted, and the owner reclaims them, he alone is entitled to receive them. A question has often been raised, whether an innocent bailee is generally responsible to any other person than him from whom he has received the goods, or, in case of his death, to his legal representatives. It was formerly held, that, if the goods of A. are bailed by B. to C., C. must redeliver them to B., for (it was said) C. cannot, as bailee, be allowed to remove or alter that possession which has been committed to him, in order to restore it to the right owner; for, the right of restitution must be demanded of the bailor, B., that did the injury, of which the bailee has no pretence to judge; and therefore it would be downright treachery in him to deliver them to any other person than the bailor. (Bac. Abr. Bail-

ordinary, or *slight* neglect; although a bailee of this species ought regularly to be answerable only for a violation

ment, A.; Reeve's Hist. 449, 453; 1 Roll. Abr. 606, 607, Detinue, C. Fitz. N. B. 138, M. Bro. Trespass, 216, 295. 2 Saund. 47 b, Wms. note. 6 Mod. 216). But, it was said, that, in such a case, if B., the bailor, dies, then his executors are chargeable only to A., who has the right, for the executors came to the possession by law, and therefore must deliver it to those persons in whom the law has established the property. (Id. Ibid, 9 Hen. 6, 58). This doctrine, however, even in regard to the bailee himself, was probably limited to cases where the bailor came to the possession of the goods by right; for, if he came to them by wrong, it would seem that the owner might reclaim them from any person in whose possession they were found. But the doctrine itself may now be justly deemed over-ruled, and the right of the owner to recover his property in all cases against a person having no title, whether a bailee or not, and whether a first or a second bailee, seems now fully established in our law, for the reason that the bailee can never be in a better situation than his bailor. (Taylor v. Plumer, 3 M. & S. 562). If the latter has no title, the real owner is entitled to recover the property, in whose hands soever it may be. (Id. Ibid. Wilson v. Anderton, 1 B. & Adol. 450. Ogle v. Atkinson, 5 Taunt. 759). Recent cases have also decided, that, if a bailee of goods for a particular purpose transfers them in contravention of that purpose, even although it be to a bona fide vendee without notice, the latter cannot resist the claim of the owner. (Wilkinson v. King, 2 Camp. N.P.C. 335; Loeschman v. Machin, 2 Stark. N. P.C. 311). By a recent statute, however, if a bailee has a lien, the owner cannot recover the thing bailed from him to whom it has been improperly transferred, without first discharging the amount of the lien. (6 Geo. 4, c. 90). If a bailor, after a deposit, transfers to another person his right to the thing deposited, the latter cannot, it is said, compel a delivery to himself, but the bailee, if he chooses, may deliver it to the person to whom it is transferred, and it will be a justification. (Rich v. Aldred, 6 Mod. 216, *quære*). But, if A. delivers goods to B. to be delivered over to C., there C. hath the property, and may demand the goods; for, B. undertakes to make the delivery to C., and hath no interest or claim but for that purpose. (Bac. Abr. Bailment, D. 2 Bulst. 68. Roll. Abr. Detinue, C. 606.

of *good faith*. This is the common doctrine taken from the law of Ulpian; but there seems, in reality, to be no ex-

9 Hen. 6, 58). But, in such cases, there must be a clear assent on the part of B. to such undertaking; for, the mere receipt of the goods will not always be sufficient to establish such assent. It has been settled by several modern decisions, that, in case of a remittance of a bill to an agent or banker with directions to apply a part of it to the payment of a debt due to a third person, the mere fact of a receipt of the remittance does not, unless the remittee assents to such disposition of the proceeds, and agrees to pay over the same to the creditor, amount to such an appropriation of the proceeds as will enable such creditor to recover the same against the remittee. And the same principle has been applied to a consignment of goods for sale with directions to make payment of a debt out of the proceeds. (*Williams v. Everett*, 14 East, 582. *Wedlake v. Hurley*, 1 Cr. & Jervis, 83. *Yates v. Bell*, 3 B. & Ald. 643. *Stewart v. Fry*, 7 Taunt. 339. *Grant v. Austen*, 3 Pri. 58).

It has been further asserted to be law (though it is open to much question), that, if goods are delivered to a bailee, to be delivered over to another, and afterwards an action be brought against him by one who hath a right to the goods, the defendant may, pending the action, deliver over the goods to the person to whom upon the bailment they were deliverable, and he will be discharged. (*Fitz. N. B.* 138 M. *Bac. Abr. Bailm. D. Roll. Abr. Detinue, D.* 607). But a bailor, where the delivery over is not for a valuable consideration, may at any time countermand his bailment, and, after such countermand, the delivery over by his bailee will not be good. (*Bac. Abr. Bailm. D.*).

If a bailee delivers the goods to a second bailee, the first bailee may demand and recover the same from the second bailee; because the latter hath possession of the former, and undertakes for the custody. But the original bailor may also demand and recover the same from either bailee, because he has the property, and both are bound to answer him. (*Isaac v. Clarke*, 2 Bulst. 306, 312, per Coke, C. J. *Bac. Abr. Bailm. D. Roll. Abr. Detinue, C.* p. 606. 9 Hen. 6, 58. See *Gosling v. Birnie*, 5 Moore & P. 160, 7 Bing. 339). If the second bailee has delivered the goods to the original bailor, it is said that it is no bar to a suit by the first bailee against him. (*Roll. Abr. Detinue, C.* 606. 9 Hen. 6, 58). But this doctrine seems at all times to have been questionable. (See *Flewelin v. Rave*, 1 Bulst. 69). And it

ception in the present case from the general rule; for, since *good faith* itself obliges every man *to perform his actual engagements*, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute soever, by which his employer may sustain damage, nor *omit* any thing, however inconsiderable, which the nature of the act requires (*g*): nor will a want of ability to

(*g*) Lord Raym. 910.

may now be considered as entirely exploded by the recent authorities. (*Ogle v. Atkinson*, 5 Taunt. 759. *Wilson v. Anderton*, 1 B. & Adol. 430). If the bailee should lose the goods bailed, and a stranger finding them should deliver them to the bailor, there the finder would not be liable to the bailee, for he does not come in in privity under the bailment. (*Roll. Abr. Detinue, C.*, 606, 607). But it is said, that, if a recovery is had by a third person against a stranger so finding the goods, he will still be liable to the true owner of them in an action; for, it is no answer to the owner that another has recovered from the finder what he had no right to. (*Roll. Abr. Detinue, C.*, 607. *Bac. Abr. Bailm. D*). Whenever such a question shall again arise, it may probably be thought worthy of further consideration, especially if the finder has had no notice of the true ownership.

Where a deposit has been made by a servant in behalf of his master, the goods are to be re-delivered to the master; especially if he gives notice that they should not be re-delivered to the servant. But a delivery back to the servant would in many cases, and especially where there was no reason to suspect impropriety, be a good discharge.

No right of action, however, accrues in any cases against the bailee without reward, unless there has been some wrongful conversion, or loss by the gross negligence of the bailee, until after a demand made upon him, and a refusal by him to re-deliver the deposit. A demand and refusal is ordinarily evidence of a conversion, unless the circumstances constitute a just excuse or a justification of the refusal. (*Story*, 78).

perform the contract be any defence for the contracting party; for, though the law *exacts no impossible things*, yet it may justly require that every man should know his own strength before he undertakes to do an act, and that, if he delude another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almost needless to add, that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties; but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*, or, its equivalent (23), *gross* neglect.

Distinction between *nonfesance* and *misfesance*.

[55]

A distinction seems very early to have been made in our law between the *nonfesance* and *misfesance* of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable (*h*). However, in a subsequent reign,

(*h*) Year B. 11 Hen. IV. 33.

(23) Vide ante, p. 43, n. 16.

when a similar action was commenced against one Watkins for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which Chief Justice Babington at length interrupted by ordering the defendant's counsel either to plead or to demur; but Serjeant Rolf chose to plead specially, and issue was taken on a *discharge* of the agreement (*i*). Justice Martin objected to the action, because no tort was alleged; and he persisted warmly in his opinion, which seems not wholly irreconcilable to that of his two brethren; for, in the cases which they put, a special injury *was* supposed to be occasioned by the non-performance of the contract.

Authority and reason both convince me, that Martin, into whose opinion the reporter recommends an inquiry, was wrong in his objection, if he meant, as Justice Cokain and the Chief Justice seem to have understood him, that no such action would lie for *nonfesance*, even though special damage had been stated. His argument was, that the action before them *sounded in covenant* merely, and required a specialty to support it; but that, if the covenant had been changed into a *tort*, a good writ of trespass on the case might have been maintained: he gave, indeed, an example of *misfesance*, but did not controvert the instances which were given by the other judges.

[56]

It was not alleged, in either of the cases just cited, that the defendant was to receive *pay* for the fesance of his work; but, since both defendants were described as *actually in trade*, it was not, perhaps, intended, that they were to work *for nothing*. I cannot, however, persuade myself, that there would have been any difference,

(*i*) Year B. 3 Hen. VI. 36 b. 37 a. Stath. Abr. tit. Accions sur le cas, pl. 20.

had the promises been purely *gratuitous* (24), and had the special injury been caused by the breach of them. Suppose, for instance, that Robert's corn-fields are surrounded by a ditch or trench, in which the water from a certain spring used to have a free course, but which has of late been obstructed by soil and rubbish; and that Robert informed his neighbour Henry of his intention speedily to clear the ditch, Henry offers and undertakes immediately to remove the obstruction and repair the banks *without reward*, he having business of the same kind to perform on his own grounds: if, in this case, Henry neglect to do the work undertaken, "and the water, not having its natural course, overflow the fields of Robert, and spoil his corn," may not Robert maintain his action on the case? Most assuredly; and so in a thousand instances of proper bailments that might be supposed, where a just reliance on the promise of the defendant prevented the plaintiff from employing another person, and was consequently the cause of the loss which he sustained (*k*); for it is, as it ought to be, a general rule, that, for every *damnum injuriâ datum*, an action of some sort, which it is the province of the pleader to advise, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the just maxim of Paulus, *Adjuvari nos, non decipi, beneficio oportet* (*l*): but the *special* damage, not the assumption, is the cause of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another person may be employed*, that he can-

[57]

(*k*) Year B. 19 Hen. VI. 49.(*l*) D. 13. 6. 17. 3.

(24) No consideration, or undertaking to pay, being alleged, the promises, for the purpose of adjudication, could be regarded only as gratuitous.

not perform the work, no process of law can enforce the performance of it.

A case in Brooke, made complete from the Year-Book, to which he refers, *seems* directly in point; for, by Chief Justice Fineaux, *it had been adjudged*, that, "if a man assume to build a house for me by a certain day, and do not build it, *and I suffer damage by his nonfesance*, I shall have an action on the case, as well as if he had *done it amiss*:" but it is *possible* that Fineaux might suppose a consideration, though none be mentioned (m), (25).

(m) Bro. Abr. tit. Action sur le Case, 72.

(25) The modern case of *Elsee v. Gatward* (5 T. R. 143) decides, beyond all controversy, that, in the case of a gratuitous contract, no action for nonfesance will lie, even though special damage be sustained. In that case the defendant, a carpenter, was charged with having undertaken to repair, by a given time, certain premises of the plaintiff, and with not having done so; in consequence of which nonfesance the plaintiff was alleged to have sustained certain special damage; but no consideration for the undertaking was stated; the undertaking, therefore, *secundum allegata*, being gratuitous, the court held the action not maintainable, though special damage was stated. The following remarks of the learned American commentator upon this principle of the common law are well entitled to an attentive consideration:—"The grounds," says Dr. Story, "upon which this doctrine of the common law is founded, have often been matters of inquiry by ingenious minds. There is so much apparent equity in allowing compensation for injuries resulting from a misplaced confidence in others, that it is not easily reconcilable with a sense of justice to allow that the contrary rule ought to prevail. Besides, there is an artificial refinement in the distinction between nonfesance and misfesance, which seems to be a little unphilosophical, and not quite agreeable to the dictates of common sense.

"It is not easy, in all cases, to give satisfactory reasons for doctrines which are, nevertheless, firmly established in the jurisprudence of many countries. In some instances, those doctrines were probably

Actions on this contract are, indeed, very uncommon, for a reason not extremely flattering to human nature;

founded in accidental or temporary reasons; in others upon false theories; and in others again upon what may fairly be deemed a mere measuring cast of conflicting opinions. But, whenever a doctrine is established in either way, it cannot, upon the theory of our judicial institutions, be broken in upon, without disturbing the certainty, as well as the harmony, of the law. Perhaps, it would have been better if the distinction alluded to had never been recognized, and the broad principle of the Roman code, to give a remedy in cases of special damage, had been universally proclaimed. It is not, however, difficult to perceive some of the reasons upon which the common law has stopped at its present point, as that law generally aims more at practical good than mere theoretical consistency.

“There are many rights and duties of moral obligation which the common law does not even attempt to enforce. It deems them of imperfect obligation, and therefore leaves them to the conscience of the individual. And, in a practical sense, there is wisdom in this course; for, judicial tribunals would otherwise be overwhelmed with litigation, or become scenes of the sharpest conflict upon questions of casuistry and conscience. It is a fundamental principle of the common law, that a valuable consideration is necessary to support every parol contract; and the importance of such a consideration is never lost sight of except in solemn instruments under seal. A gratuitous contract, not under seal, is therefore absolutely void;—it has no legal existence or power. Now, a mandate is precisely a contract of this nature. What reason is there for excepting this particular class of contracts out of the general rule, any more than many or even all others? It may not involve more of good faith or confidence than many others. We must, then, either dispense with the general rule, or with exceptions, or draw an arbitrary line between them. The common law has adopted the former course, as the wisest and safest both in principle and application. The rule being once known and established, there cannot be any real ground of complaint on the part of the mandator. He knew, or might have known (and his ignorance of the law cannot constitute any better excuse in this than in other cases), that the contract was a nullity. It was his own folly or rashness to confide in it. If he trusted to it,

because it is very uncommon to undertake any office of trouble *without compensation*: but, whether the case

he took the risk of non-fulfilment upon himself, and he has no right to complain that he has suffered by that risk which has been the result of his own overweening confidence. In regard to the distinction between nonfeasance and misfeasance, although it is nice, it may be accounted for in this way. The mandatary has his choice to renounce the contract, or to perform it; to treat it as a nullity or as a subsisting obligation. If he chooses to consider it in the latter light, and to act upon it as obligatory, why should he be permitted to separate the parts of the obligation, or to disjoin those which were entered into as a whole? Besides, an injury accrues, and the mandatary sues the other party for the wrong. The wrong is admitted, and the party sets up the contract in his defence. Ought the law to give him the benefit of the contract as a subsisting obligation to protect him from being deemed a mere unauthorized wrong-doer; and yet at the same time to enable him to escape from its obligations by proving that he has violated the fundamental terms of that very contract? The common law has deemed it unreasonable that he should have such an indulgence. It has left him free to act, or not to act; if he chooses to act, it is at his own peril. He is not at liberty to commit a tort, and then shift his defence upon the imperfect obligation of a contract under which the tort was done. It is difficult to affirm that there is anything positively inequitable or unjust in this; and it is not inconsistent with the general rule as to void pacts, that the common law should give a remedy for injuries occasioned by an unskilful or mischievous execution of the trust.

“Whether this reasoning is entirely satisfactory or not, it furnishes the key to the doctrine now under consideration; and, if the result is thought to be inconvenient, it exclusively belongs to the legislative power to apply the proper remedy. It may, however, be observed, that it is generally a favourite policy of the common law to prompt men to vigilance and care in their own concerns, and not to an over-confidence in others.

“The same rule which is applied by the common law to cases of malfeasance, governs also cases of negligent execution of a gratuitous trust or agency; as, for instance, if a gratuitous agent undertakes to procure a policy of insurance which is in his own name, to

really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question, "whether a man was responsible for damage to certain goods, occasioned by his negligence in performing a *gratuitous* promise," came before the court in which Lord Holt presided, so lately as the second year of Queen Anne; and a point which the first elements of the Roman law have so fully decided that no court of judicature on the continent would suffer it to be debated, was thought in England *to deserve*, what it certainly received, *very great consideration* (n).

Case of Coggs
and Bernard.

The case was this: Bernard had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgment, on the irrelevancy of the declaration, in which it was neither alleged that the defendant was to have *any recompense for his pains*, nor that he was a *common porter*: but the court were unanimously of opinion that the action lay; and, as it was thought a matter of great consequence, each of the judges delivered his opinion separately.

[59]

The Chief Justice, as it has before been intimated (o), pronounced a clear, methodical, elaborate argument; in

(n) Ld. Raym. 909—920. 1 Salk. 26. Com. 133. FARR. 13, 131, 528.

(o) Page 35.

be renewed and assigned to a party who has become a purchaser of the property insured, and he proceeds to procure a renewal of the policy, but makes no assignment thereof, so that, upon a subsequent loss of the property, no recovery can be had by the purchaser, he will be responsible for the loss, although, if he had done nothing, he would have been exonerated from all responsibility." *Wilkinson v. Coverdale*, 1 Esp. N. P. C. 75." (Story, 119).

which he distinguished bailments into *six* sorts, and gave a history of the principal authorities concerning each of them. This argument is justly represented by my learned friend, the annotator *on the First Institute*, as “a most masterly view of the whole subject of bailment (*p*);” and, if my little work be considered merely as a commentary on it, the student may, perhaps, think that my time and attention have not been unusefully bestowed.

For the decision of the principal case, it would have been sufficient, I imagine, to insist that the point was *not new*, but had already been determined; that the writ in the Register, called, in the strange dialect of our forefathers, *De pipá vini cariandá* (*q*), was not similar, but identical; for, had the reward been the *essence* of the action, it must have been inserted in the writ, and nothing would have been left for the declaration but the stating of the day, the year, and other circumstances; of which Rastall exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickset hedge*, which the defendant had promised to raise, *without any consideration alleged*; and issue was joined on a traverse of the negligence and improvidence (*r*). How any answer could have been given to these authorities, I am at a loss even to conceive; but, although it is needless to prove the same thing twice, yet other authorities, equally unanswerable, were adduced by the court, and, supported with reasons no less cogent; for, *nothing*, said Mr. Justice Powell emphatically, *is law that is not reason*; a maxim, in theory excellent, but in practice

[60]

(*p*) Harg. Co. Litt. 89. b. n. 3. The profession must lament the necessary suspension of this valuable work.

(*q*) Reg. Orig. 110 a. see also 110 b. De equo infirmo sanando, and De columbari reparando.

(*r*) Rast. Entr. 13 b.

dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of Titius may, and frequently does, differ from the reason of Septimius, no man who is not a lawyer would ever know how to act, and no man who is a lawyer would in many instances know what to advise, unless courts were bound by *authority* as firmly as the pagan deities were supposed to be bound by the decrees of fate.

[61] Now, the *reason* assigned by the learned judge for the cases in the Register and Year-Books, which were the same with Cogg and Bernard, namely, "that the party's *special* assumpsit and undertaking obliged him *so* to do the thing that the bailor came to no damage by his neglect," seems to intimate, that the omission of the words *salvo et secure* would have made a difference in this case, as in that of a *deposit*; but, I humbly contend that those words are implied by the nature of a contract which lies *in fessance*, agreeably to the distinction with which I began this article (25). As judgment, indeed, was to be given on the record merely, it was unnecessary, and might have been improper, to have extended the proposition beyond the point then before the court; but I cannot think that the narrowness of the proposition in this instance affects the general doctrine which I have presumed to lay down; and, in the strong case of the shepherd, *who had a flock to keep*, which he *suffered through negligence to be drowned*, neither a *reward* nor a *special* undertaking are stated (*s*): that case, in the opinion of Justice Townsend, depended upon

(3) Year B. 2 Hen. VII. 11. The allegation of negligence implies, that the shepherd acted upon the mandate. It was therefore not a case of nonfessance, but like that referred to in the Register, and in the Year-Books.—T.

(25) See post, p. 62, n. 27.

the distinction between a bargain *executed* and *executory*: but I cannot doubt the relevancy of an action in the second case, as well as the first, *whenever actual damage is occasioned by the nonfesance* (t), (26).

There seems little necessity after this to mention the case of Powtuary and Walton, the *reason* of which applies directly to the present subject; and, though it may be objected that the defendant was stated as a *farrier*, and must be *presumed* to have acted *in his trade*, yet Chief Justice Rolle intimates no such presumption; but says expressly, that “an action on the case lies upon this matter, *without alleging any consideration*: for, the *negligence* is the cause of action, and not the assumption (u).”

[62]

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work* (27): and, there being nothing to take it out of the

(t) Stath. Abr. tit. Accions sur le cas, pl. 11. By Justice Paston, “si un ferroux face covenant ove moy de ferrer mon chival, jeo die qe sil ne ferra mon chival, uncore jeo averai accion sur mon cas, qar en son default peraventure mon chival est perie.”

(u) 1 Ro. Abr. 10.

(26) Vide ante, contrà, p. 57, n. 24.

(27) The distinction here said to exist between a mandate to do work; and a mandate to carry, in respect of the mandatary's obligation, has been impugned with great ability by Dr. Story. If such a distinction, says he, is clearly settled in the common law, it ought to be acquiesced in, even if the reasons on which it is built should not be thought entirely satisfactory. But the inquiry naturally presents itself, whether it is thus firmly established. Sir W. Jones has cited no authority in support of it, and none has been found in my researches which directly recognizes it.

It is worthy of remark, that the whole reasoning of Sir W. Jones on this subject is exclusively derived from views taken of the civil law by some of its able commentators; but they apply it to all cases of mandates whatsoever, and by no means limit it to cases where

general rule, I cannot conceive that the bailee is responsible for *less* than *gross* neglect, unless there be a *spe-*

work is to be performed. So far as their authority goes, then, it repudiates the distinction; and so far as their reasoning goes, it proceeds on a basis applicable to every species of mandate. And, indeed, it is very difficult to perceive in common sense or in legal principles, any ground upon which the distinction can be maintained. A mandate to carry a thing from one place to another may properly enough be deemed a mandate to perform work; and it imports, just as much as a mandate to do work, an engagement to perform the undertaking, and to exercise due diligence and care about it.

If A. undertakes gratuitously to carry B.'s goods from one place to another, does not good faith oblige him to perform his undertaking, and to exert proper diligence in proportion to the exigence of the affair? Does not the bailor trust to his fidelity in performing it, with as much confidence as when he undertakes to do work, strictly speaking, upon the same goods? Why should he not be under the same obligation to carry safely, as to do the work well? When he undertakes to carry, does he not, by necessary implication, engage that he has ability to do so, and that he will exercise all reasonable diligence to accomplish his undertaking?

To do work on goods is not, or may not be, more important than to carry them to another place. To carry jewels safely may be a far more valuable service, and require far more vigilance, than to clean the gold which inchoates them. The same reasoning, then, seems applicable to each class of mandates; and it is applied in the text of the civil and foreign law from which it is borrowed indiscriminately to all. Where the act to be done requires skill, and the party who undertakes it, either has the skill, or professes to have it, then he may well be made responsible for the want of due skill, or for the neglect to exercise it. In such cases, the undertaking may well be deemed a special undertaking to exercise due skill; and, the omission of it imports, in all such cases, at least ordinary negligence. But this class of cases stands, not as an exception from the present law, but as a qualification of it from the implied engagement of the mandatary. It is only deciding that the parties may vary the responsibility implied by law by an express or implied contract for this purpose.

cial acceptance: for instance, if Stephen desire Philip to carry a diamond ring from Bristol to a person in Lon-

If there be no authority in support of the distinction suggested by Sir W. Jones, and none has been produced, the inquiry next occurs, whether there are not authorities which lead the other way. In the great case of *Coggs v. Bernard*, (2 Ld. Raym. 909), where all the antecedent authorities were reviewed, and where Lord Holt expounds the nature and responsibility arising from every kind of bailment, no such distinction is hinted at. Yet that was the case of a mandate to carry goods; and Lord Holt says, this undertaking obliges the undertaker to diligent management. The reasons, he says, are, because in such a case a neglect is a deceit to the bailor, who trusts the bailee upon his undertaking to be careful, and the latter puts a fraud upon the former by being negligent. And Lord Holt puts, by way of illustration of his doctrine, the case of a mandate of the other sort, namely, an action against a man who had undertaken to keep one hundred sheep, and he was held liable for letting the sheep be drowned by his default. He afterwards puts the case of a carpenter who unskilfully builds a house without reward, and suggests no difference between that case and a mandate to carry. From these considerations, it may be deduced, that, as Lord Holt, in treating on the express point, suggests no such distinction, none was in his judgment furnished by the common law. Mr. Justice Gould in the same case said, "If a man takes upon him expressly to do such a fact [an act] safely and securely, if the thing comes to any damage by his miscarriage, an action will lie. If it be only a general bailment (that is without such express undertaking), the bailee will not be answerable without gross neglect." So that the difference he insists on is, between a special contract and the general obligation implied by law from the nature of the bailment. The case of *Moore v. Mougue* (Cowp. R. 480) probably decided the very question under consideration, if that case was a gratuitous undertaking. There, an agent, having written orders for the purpose, procured a policy of insurance to be made, but in the policy there was an exception of a risk common in the policies of other offices, but not in those used in this office; and the loss arose from that risk, and the same premium was given in all the offices, without any increase on account of such risk. It was held by the court, that the agent was not liable, as he had acted *bonâ fide*, and to the best of his judgment, and without gross negligence.

don, and he put it, *with bank notes of his own*, into a letter-case, out of which it is *stolen* at an inn, or seized

There is, however, nothing on the face of the report which absolutely settles it to have been a gratuitous undertaking, though the structure of the case would lead to that conclusion. But the case of *Shiells v. Blackburne* (1 H. Bl. 158) seems directly in point against the distinction of Sir William Jones. There, a merchant had undertaken gratuitously to enter certain goods of the plaintiff at the custom-house with his own goods of the like kind, and by mistake he entered them by a wrong name, so that all the goods were seized and lost, both the plaintiff's and his own. An action was brought by the plaintiff to recover damages for this misfeasance; and, upon full consideration, the court held, that, as there was not any gross negligence, the action would not lie. Now, this was the very case of a mandate to do an act, in contradistinction to one to carry goods. And, if the contract did per se imply an engagement to use all the care and diligence which were necessary to the performance of the act, namely, to make a proper entry at the custom-house, and the bailee omitted so to do, he ought to have been held liable, even if there was not gross negligence. The court, however, put the case upon the true ground of a general mandate, where there is no special undertaking for skill. Mr. Justice Heath there said: "The defendant was not guilty either of gross negligence or fraud. He acted *bonâ fide*. If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But, if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his abilities, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it and who acted to the best of his knowledge to an action?" Mr. Justice Wilson said: "Where the undertaking is gratuitous, and the party has acted *bonâ fide*, it is not consistent either with the spirit or the policy of the law to make him liable to an action. A wrong entry at the custom-house cannot be considered as gross negligence, when, from the variety of laws, &c., reliance

by a robber on the road, Philip shall not be answerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purse at the inn, and have concealed it somewhere in the carriage; but,

must be placed on the clerks in the office." Lord Loughborough said: "I agree with Sir William Jones, that, where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence. But, if a man gratuitously undertake to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker or clerk in the custom-house had undertaken to enter the goods, a wrong entry in them would be gross negligence, because their situation and employment imply a competent degree of knowledge in making such entries. But, when an application under the circumstances of this case is made to a general merchant, to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." So that the whole court held that a mandatary was not liable, except for gross negligence, and that an express or implied warranty of skill was necessary under such circumstances to impute to him gross negligence. The doctrine of the case of *Shiells v. Blackburne* has never been impeached, and it is incidentally confirmed in other analogous cases. (*Nelson v. M'Intosh*, 1 Stark. N. P. C. 237. *Rooth v. Wilson*, 1 B. & Ald. 59). Sir W. Jones himself puts a case which shews the propriety of admitting this doctrine; for, he agrees that if an unskilful man, who is known to be so, does the work at the solicitation of a friend with such ability as he possesses, he stands excused, although it is unskilfully done; for, it is the mandator's own folly to trust to him, and the party engages for no more than a reasonable exertion of his capacity (*Jones*, 53, 98). It is apparent, then, that the fact of skill or want of skill, as known, or unknown to the bailor, or professed or not professed by the bailee, constitutes a material ingredient in construing the engagement, and qualifies or enlarges it. In other terms, it varies the presumption as to the actual contract, according to the express or implied intention of the parties. It is not so much an exception from the common rule, as a waiver or limitation of it. (*Story*, 127).

[63]

if he were to secrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaise, I think he would be bound, in case of a loss by stealth or robbery, to restore the value of it to Stephen: every thing, therefore, that has been expounded in the preceding article concerning *deposits*, may be applied exactly to *this sort* of bailment, which may be considered as a subdivision of the second species (28).

(28) *Primâ facie*, in cases of a general mandate, the fact that the party did the work on the bailment with the same care that he did the work on like goods of his own, would repel the imputation of any negligence. (*Lane v. Cotton*, 1 *Ld. Raym.* 646. *Kettle v. Bromsall*, *Willes*, R. 121). But, without doubt, the presumption may be overcome by proofs of actual negligence (*Rooth v. Wilson*, 1 *B. & Ald.* 59), or of conduct which, though applied to his own goods as well as those bailed, would be deemed negligent in a bailee without hire of ordinary prudence. Of the former position, the case of a person gratuitously undertaking to carry a diamond ring, and putting it with bank notes of his own into a letter-case, affords an apt illustration. (*Jones*, *supra*, 62). The other position is illustrated by a case which has passed into actual judgment. (*American case*, *Tracy v. Wood*, 3 *Mason*, R. 132). A. undertook gratuitously to carry two parcels of doubloons for B. from New York to Boston, in a steam-boat, by the way of Providence. A. in the evening (the boat being to sail early in the morning) put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board the steam-boat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A. went away in the evening, and returned late, and slept in another cabin, leaving his valise where he had put it. The next morning, just as the boat was leaving the wharf, he discovered on opening his valise that one bag was gone, and he gave an immediate alarm and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and, on his return, the other bag also was missing. An action being brought against

Since we have nothing in these cases analogous to the judgments of *infamy*, which were often pronounced at

him by the bailor for the loss of both bags, the question was left to the jury whether there was not gross negligence, although the bailee's own money was in the same valise. The jury was directed to consider whether the party used such diligence as a gratuitous bailee ought to use under such circumstances. They found a verdict for the plaintiff for the first bag lost, and for the bailee for the second.

It scarcely requires to be stated, that the degree of care which a mandatary may be required to exert, must be materially affected by the nature and value of the goods, and their liability to loss or injury. That care and diligence which would be sufficient as to goods of small value or of slight temptation, might be wholly unfit for goods of great value, and very liable to loss or injury. In the former case, the same acts might be deemed slight neglect only, which in respect to the latter might be justly deemed gross neglect. Illustrations of this rule have already been presented in another place. Lord Stowell, in the case of *The Rendsberg* (6 Rob. 142, 155), put a case in point. "If," said he, "I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss, though his pocket were picked in the way. But, if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable; because he would be guilty of the *negligentia malitiosa*, in doing that from which the law must infer that he intended the event which has actually taken place." Perhaps the best general test is, to consider whether the mandatary has omitted that care which bailees without hire, or other mandataries of common prudence, are accustomed to take of property of the like description.

The rule in respect to the mandatary's liability, applies only to cases where he is in the actual performance of some act or duty entrusted to him in regard to the property. For, if he violates his trust by a misuser of the property, or does any other act inconsistent with his contract, or in fraud of it, he will be clearly liable for all losses and injuries resulting therefrom. He is not bound to suggest wise precautions against accident or loss, but he is not at liberty to expose

Rome and Athens, it is hardly necessary to add, what appears from the speech of Cicero for S. Roscius, of

the property to injury or loss by hazard inconsistent with his duty. And, in cases of misuser, especially such as might amount to evidence of a conversion, it may perhaps be true that every subsequent loss and injury, whether by accident or otherwise, would be at the risk of the mandatary. *Catlin v. Bell*, 4 Camp. 183.

Of the interest of the mandatary.—In general, a mandatary can be said to have a special property in the thing bailed only when he has incurred expenses about it, and, consequently, has a lien. But, even when he has no special property, he may have an action for any tort done to the thing while in his possession; for, it is a general principle of the common law, that possession, with an assertion of right, and, in many cases, possession alone, is a sufficient title for the maintenance of an action against a mere wrong-doer: and, therefore, if a mandatary deliver goods to another person, and they receive an injury for which the mandatary would be liable over to the owner, he may recover for his own indemnity. This principle, however, seems (in *Miles v. Cattle*, 4 Moore & P. 630, 6 Bing. 743*) to have been deemed inapplicable to the case of a mandatary who had disobeyed the direction under which a parcel had been entrusted to him, and thereby had made himself personally responsible to the owner—first, because (it was said) he had no special property in the parcel which had been delivered to him for a purpose not fulfilled by him; and, secondly, because he had deprived the defendants of the intended hire for the carriage of the parcel.

* Vide ante, p. 53, n. 22. Upon this case, Dr. Story, with evident, and I should add, just dissatisfaction, observes: "Whether this case can be distinguished in principle from other decisions which have been made in cases of deposits and gratuitous loans" (that is, whether it falls under a different principle); "and whether, if not so distinguishable, it" (that is, the decision of this case as opposed to the decisions of other cases) "stands upon more satisfactory reasoning and better analogies of the law, deserves the consideration of those who," &c., (that is, of the courts when they shall have a similar case to adjudicate upon).

Ameria, that "the antient Romans considered a mandatary as *infamous* if he broke his engagement, not only by actual *fraud*, but even by *more than ordinary negligence* (*w*)."

As to *exceptions* from the rule concerning the degree of neglect for which a mandatary is responsible, almost all that has been advanced before in the article of *deposits*, in regard to a special convention, a voluntary offer, and an interest accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an absent person, and *without his knowledge*, is the negotiorum gestor (29) of the civilians, and the obligation resulting from his implied contract has been incidentally mentioned in a preceding page.

Exceptions to the rule.

(*w*) In privatis rebus, si quis rem *mandatam* non modo *malitiosius* gessisset, sui quæstus aut commodi causa, verum etiam *negligentius*, eum majores summum admisisse dedecus existimabant: itaque *mandati* constitutum est judicium, non minus turpe quam *furti*." Pro S. Rosc. p. 116. Glasg.

(29) The case of *Nelson v. Macintosh* (1 Stark. N. P. C. 237) approaches very near to that of the negotiorum gestor. A master of a ship had gratuitously taken charge of and received on board of his vessel a box containing doubloons and other valuables belonging to a passenger, who was to have worked his passage, but was accidentally left behind. During the voyage, the master opened the box in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it; and he took out the contents and lodged them in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, the bag was missing. The master was held responsible for the loss, on the ground that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed by means of the alteration in the place of custody, although, as a bailee without hire, he might not otherwise have been bound to take more than a prudent care of them; and that he had been guilty of negligence in guarding the goods.

Law of loans
for use.

III. On the third species of bailment, which is one of the most usual and most convenient in civil society, little remains to be observed, because our own and the Roman law are on this head perfectly coincident. I call it, after the French lawyers, *loan for use*, to distinguish it from their *loan for consumption*, or the *mutuum* of the Romans; by which is understood *the lending of money, wine, corn, and other things, that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity (x)*: this latter contract, which, according to St. German, is most properly called a *loan*, does not belong to the present subject; but it may be right to remark, that, *as the specific things are not to be returned, the absolute property of them is transferred to the borrower, who must bear the loss of them if they be destroyed by wreck, pillage, fire, or other inevitable misfortune (30)*. Very different is the

(x) Doct. and Stud. dial. 2, chap. 38. Bract. 99 a, b. In Ld. Raym. 916, where this passage from Bracton is cited by the Chief Justice, *mutuum* is printed for *commodatam*; but what then can be made of the words "ad ipsam restituendam?" There is certainly some mistake in the passage, which must be very ancient, for, the oldest MS. that I have seen is conformable to Tottel's edition. I suspect the omission of a whole line after the word *precium*, where the manuscript has a full point; and possibly the sentence omitted may be thus supplied from Justinian, whom Bracton copied. "At is, qui *mutuum* accepit, obligatus remanet," si forte incendio, &c. Inst. 3, 13, 2.

(30) If money, corn, wine, or any such thing which cannot be re-delivered or occupied, be borrowed, and it perish, it is at the peril of the borrower. But, if a horse, or cart, or such other things as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through default of him who borrowed them, or he made a promise at the time of delivery to re-deliver them safe again. If they be used in any other manner than

nature of the bailment in question; for, a horse, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the use of the bailee, ought to be re-delivered *specifically*; and the owner must abide the loss if they perish through any accident which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, "which the law," says the rule, "never demands;" for, that maxim relates merely to things *absolutely* impossible; and it was not only very possible, but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it; if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care than that of which *such* a person was capable; as, if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he would expect from a riding-master, or an officer of dragoons (y).

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction before made between simple *theft* and *robbery* (z), it follows, that, if the borrowed goods be *stolen* out of his possession by any

[66]

(y) Dumoulin, tract. De eo quod interest, n. 185. (h) See p. 44, and n. (o)

according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them in law and conscience. Noy's Maxims, 91—Bythewood's ed. 211.

person whatever, he must pay the worth of them to the lender, unless he prove (31) that they were purloined notwithstanding his *extraordinary* care. The example given by Julian is the first and best that occurs: Caius borrows a silver ewer of Titius, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, Caius appears to be wholly blameless, and Titius has suffered *damnum sine injuriâ*. It seems hardly necessary to add, that the same care which the bailee is bound to take of the *principal* thing bailed must be extended to such *accessory* things as belong to it and were delivered with it: thus, a man who borrows a watch, is responsible for *slight* neglect of the chain and seals.

Opinion of

Although the laws of Rome, with which those of Eng-

(31) With respect to the question upon whom, in case of any damage or loss to the thing loaned, the burthen of proof rests, whether on the lender to establish the neglect of the borrower, or upon the latter to establish his innocence, Dr. Story observes, that it is not easy to lay down any absolute rule as the rule of the common law on this subject, which would not be open to many exceptions. Where a demand of the thing loaned is made, the party must return it, or give some account how it is lost. If he shews a loss the circumstances of which do not lead to any presumption of negligence on his part, there the burthen of proof might, perhaps, belong to the plaintiff to establish. There are cases, at least, in which it has been held that the plaintiff must prove negligence under special circumstances. But, where there is a demand of the thing loaned, and a general refusal, without any special excuse at the time of the demand, there the burthen of proof would seem to be on the defendant to negative the *prima facie* right of recovery thus made out by the plaintiff. And, in many complicated cases of evidence, the burthen of proof may ultimately shift from one party to the other in different stages of the trial.

land in this respect agree, most expressly decide, that a borrower using more than ordinary diligence *shall not be chargeable, if there be a force which he cannot resist* (a), yet Puffendorf employs much idle reasoning, which I am not idle enough to transcribe, in support of a new opinion, namely, "that the borrower ought to indemnify the lender, if the goods lent be destroyed by fire, shipwreck, or other inevitable accident, and *without his fault*, unless *his own* perish with them:" for example, if Paul lend William a horse worth thirty guineas, to ride from Oxford to London, and William be attacked on a heath in that road by highwaymen, who kill or seize the horse, he is obliged, according to Puffendorf and his annotator, to pay thirty guineas to Paul. The justice and good sense of the contrary decision are evinced beyond a doubt by M. Pothier, who makes a distinction between those cases where the loan was the *occasion* merely of damage to the lender, who might in the mean time have sustained a loss from other accidents, and those where the loan was the sole efficient *cause* of his damage (b); as, if Paul, having *lent* his horse, should be forced in the interval by some pressing business to *hire* another for himself; in this case, the borrower ought, indeed, to pay for the hired horse, unless the lender had voluntarily submitted to bear the inconvenience *caused* by the loan; for, in this sense and in this instance, *a benefit conferred should not be injurious to the benefactor*. As to a condition *presumed* to be imposed by the lender, that he would not abide by any loss *occasioned* by the lending, it seems the wildest and most unreasonable of presumptions: if Paul really in-

Puffendorf disputed.

[67]

(a) D. 44. 7. 1. 4. Ld. Raym. 916.

(b) Poth. Pret a Usage, n. 55. Puf. with Barbeyrac's notes, b. 5, c. 4, § 6.

Cases and distinctions.

tended to impose such a condition, he should have declared his mind; and I persuade myself that William would have declined a favour so hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for, *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case cited by St. German from the Summa Rosella, where a *loan* must be meant, though the word *depositum* be erroneously used (c); and it is there decided, that, if the borrower of a horse will imprudently ride by a *ruinous house in manifest danger of falling*, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were *in good condition* and *fell* by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger reason, if William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any *accident* that may befall the horse in his journey to Bath, or after the expiration of the week (d).

[69]

Thus, if Charles, in a case before put (e), wear the masked habit and jewels of George at the ball for which they were borrowed, and be *robbed* of them in his return home at the usual time and by the usual way, he cannot

(c) Doct. & Stud. where before cited.

(d) Ld. Raym. 915.

(e) Page 50.

be compelled to pay George the value of them; but it would be otherwise if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by Gaius in the *Digest*, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender if the plate be lost by accident however irresistible (32).

(32) The right of using the thing bailed is strictly confined to the use expressed or implied in the particular transaction, and the borrower, by any excess, will make himself responsible. Lord Holt has put several cases to illustrate this doctrine. If a man lends another a horse to go westward, or for a month, and the bailee goes northward, or keeps the horse above a month, if any accident happens on the northern journey, or after the expiration of the month, the bailee will be chargeable, because (says he) he has made use of the horse contrary to the use he was lent under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. (*Coggs v. Bernard*. See Appendix). Bracton inculcates the like doctrine; and it seems, indeed, as old as the first rudiments of our law. (Bracton, Lib. 3, ch. 2, s. 1).

The loan is to be considered as strictly personal, unless, from other circumstances, a different intention may be presumed. Thus, if A. lends B. her jewels to wear, this will not authorise B. to lend them to C. to wear. So, if C. lends D. his horse to ride to Boston, this will not authorise D. to allow E. to ride the horse to Boston. But, if a man lends his horses and carriages for a month to a friend for his use, then a use by any of his family, or for family purposes, may be fairly presumed; though not a use for the mere benefit of strangers.

The case of *Bringloe v. Morrice* (1 Mod. R. 210. S C. 3 Salk. 271) illustrates this doctrine. An action for trespass was brought for immoderately riding the plaintiff's horse. The defendant pleaded that the horse was lent to him by the plaintiff, and licence given to him

There are other cases in which a borrower is chargeable for *inevitable mischance*, even when he has not, as he legally may, taken the whole risk upon himself by express agreement. For example, if the house of Caius be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer which he had borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer be the more valuable, and would consequently have been

to ride him, and that by virtue of the license the defendant and his servants alternately had ridden the animal. The plaintiff demurred. And the court, on the demurrer, held, that the license was annexed to the person of the defendant, and could not be communicated to another; for, this riding was matter of pleasure. And Lord Chief Justice North took a difference where a certain time is limited for the loan of a horse, and where not. In the first case, the borrower has an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was also taken about hiring a horse to go to York, and borrowing a horse. In the first place, the party may allow his servant to ride, in the second not. The case is obscurely reported; but the real meaning of the court seems to have been, that, in cases of a mere gratuitous loan, the use is to be deemed strictly a personal favour, and confined to the borrower, unless a more extensive use can be implied from other circumstances.

In respect of the use, what is or is not within the scope of the bailment must depend upon a great variety of implications and presumptions growing out of the circumstances of each particular case; and no general rule can be laid down which will govern all cases. In general, it may be said, in the absence of all controuling circumstances, that the use intended by the parties is the natural and ordinary use for which the thing is adapted. In regard to time, if no particular time is fixed, a reasonable time must be intended, keeping in view the objects of the bailment. If a horse is lent for a journey, it is presumed to be a loan for the ordinary time consumed in such a journey, making proper allowance for the ordinary delays and the ordinary objects of such a journey. (Story, 161).

preferred had he been owner of them both: even if his urn be the more precious, he must either leave it, and bring away the borrowed vessel, or pay Titius the value of that which he has lost (33); unless the alarm was so

[70]

(33) In support of the same opinion, on a case identical with the above, Pothier reasons in the following manner. It is true, say he, that the borrower cannot be reproached with any want of fidelity; but still the borrower undertakes for extraordinary diligence, *tenetur adhibere exactissimam diligentiam*, and by the nature of his contract he engages for all risks, except losses occasioned by the *vis major*. *Præstat omne periculum præter casus fortuitos, seu vim majorem*. Now, that alone is to be deemed *vis major* which cannot be resisted; *vis major cui resisti non potest*. Although the borrower could not save both his own and the borrowed goods, yet he could have saved the latter at the expense of his own; and, therefore, they could not be said to be lost by the *vis major*. He admits that it would be otherwise where the tumult is such that the borrower has no choice, and saves what comes to his hands first, without any exercise of judgment.

Upon this reasoning, Dr. Story makes the following very able criticism:—It may seem rash to doubt the accuracy of the reasoning or conclusions of such distinguished minds, backed as they are by the positive text of the civil law; and, if the question were one of a practical nature, it might be fit to abstain from any commentary. But, as it is scarcely more than a speculative proposition, it may not be wholly useless to lay before the reader some considerations for doubt on the point:

It is observable, that the question is not stated by the learned jurists as one of presumptive evidence, fit for the decision of a court or jury, as judges of the facts, but as a conclusion of law. If the thing borrowed is of very great value, as a casket of jewels, and the thing saved is of little proportionate value, there might be some foundation for a presumption of undue preference for the latter, and an undue inattention to the former. That, however, would be matter of fact to be weighed under all the circumstances. But the case, as put, goes much further, and decides, that, even if the borrower's own property is of very great value, nay, of the highest value, and the borrowed property is of very subordinate value, the law is the same;

sudden, and the fire so violent, that no deliberation or selection could be justly expected, and Caius had time only to snatch up the first utensil that presented itself.

and a *fortiori* it is the same if they are of equal value. It is chiefly in relation to the case of the superior value of the borrower's property, that the reasoning is pressed, and to that our doubts may be now confined.

The question, in our law at least (and it would seem, also, in the civil law), is, whether the borrower has been guilty of slight negligence, which, of course, is the omission of very exact diligence; for, without that, he is not liable at all. The loss is confessedly by an "*inevitable mischance*," (for, so Sir W. Jones and Pothier put it), and, in such a case, no responsibility can attach upon the borrower, unless there has been some neglect on his own part. It is not true, as Pothier suggests, that the borrower is responsible for all losses not occasioned by the *vis major*, or fortuitous occurrences. Losses by theft, without default of the borrower, and losses of all sorts, where he exercises the proper degree of diligence, are to be borne by the lender. It is not sufficient to shew that the loss has not been absolutely fortuitous, or by the *vis major* in a strict sense. It is sufficient to shew that there has been no negligence whatsoever in occasioning the loss. The question, then, is, whether there is any negligence in the case thus presented. It is not, of course, sufficient to shew, as Pothier suggests, that the borrower has taken as good care of the borrowed goods as of his own; for, that is not the extent of his obligation, it being for very exact diligence. But, if the party does in fact use very exact diligence in respect to his own, then, if he uses the same diligence in regard to the borrowed goods as his own, his obligation is fully complied with. Now, if a man, in a case of fire, saves of his own goods those which are pre-eminently valuable, it would be against common sense to say that he did not use the utmost diligence in respect to all, when it was impossible to save all. The very case put by Pothier supposes that it is impossible to save both the lender's and the borrower's goods. In a case, then, confessedly of extreme necessity, the borrower is made responsible for an exercise of the natural right of choice. He saves the most valuable, which would seem to be a rational course, and yet he is bound to pay for the loss of the others. Pothier does not pretend, that, in such a case, there is any negligence imputable to the borrower. His

Since openness and honesty are the soul of contracts, and since "a suppression of truth is often as culpable as

reasoning implies that there is none. But he assumes (what he does not prove), that, if the thing borrowed could by possibility be saved, at however great a sacrifice, the borrower is bound to make that sacrifice. Nay, both he and Sir W. Jones seem to admit, that, if in such a case he might have saved the borrowed goods by abandoning his own, and he leaves both to perish in the flames, he is excusable. How can this be, if there is any negligence in the case, arising from the mere fact of leaving the borrowed goods? If a party suffer his own goods to perish in the flames, it is no excuse for suffering the borrowed goods to perish in the same manner. It may afford some presumption against negligence, especially if the borrower's own goods were of very superior value. But, if he might have saved the borrowed goods by uncommon diligence, where is his excuse in point of law?

But it is not true that a borrower is bound to make every possible sacrifice in order to save the borrowed goods. If a man borrows a friend's horses and carriage for a journey, he is not bound to carry with him a troop of horse to guard them against a possible robbery; nor is he bound to protect them at the risk of his own life, or to the imminent hazard of his own person, or other valuable property. If, finding himself unexpectedly beset by robbers, and not knowing their force, he abandons the horses and carriage, and he escapes with his servants, not choosing to hazard the possible chances of resistance, partly because he has very valuable treasures with him, partly from fear of assassination, can he be held responsible for the loss, if there was a fair and honest exercise of judgment, and it was such conduct as a very diligent and careful man ought to adopt? If a house is on fire, is a man bound to risk his life or limbs to save borrowed goods, even if, in the event, from unforeseen circumstances, or by great steadiness of purpose, it was possible, nay practicable, so to do? No doctrine has as yet gone to this extent. The reasoning, then, which we have been considering, turns upon a supposed superior duty in a common calamity or accident, to save that which is borrowed in preference to that which is one's own, whatever may be the value of the latter compared with the former. But the whole controversy turns upon the very question, whether there is any such superior duty. It is not to be assumed, and then reasoned from. It must

an express falsehood," I accede to the opinion of M. Pothier, that, if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were *to conceal from him that his own horse was as fit for the service*, and if the horse so borrowed were slain in the engagement, the lender ought to be indemnified; for, probably the dissimulation of the borrower induced him to lend the horse; but, had the soldier openly and frankly acknowledged *that he was unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend,

be established as a just inference from the principles of the law applicable to the subject.

The doctrine of our law is, that, in every case of a loan, to charge a borrower, there must be some neglect of duty, some slight omission of diligence. If the highest possible diligence cannot save both the borrowed goods and the goods of the borrower, where is the rule to be found which prescribes the choice in such a case, and compels a man to abandon his own for another's? Principles going much deeper into human feelings, and morals, and rights, have not insisted on such an overwhelming sacrifice of personal preference. If two men are on a plank at sea, and it cannot save both, but it may save one, it has never yet been held, that, in a common calamity and struggle for life, either party was bound to prefer the other's life to his own. If a ship is capsized at sea, and the ship's boat is sufficient to save a part of the crew only, is there a known duty to prefer a common destruction of all to the safety of a part? If the crew of a foundered ship are dying from hunger at sea, are all to perish, or may they not cast lots for life or death to preserve the rest? These cases are put merely to shew, that, in a common calamity, the law does not look to mere heroism, or chivalry, or disinterested sacrifices. If it has furnished no rule for such cases, it is because they are incapable of any; for, necessity has no law. And to say the least of it, the equity, as well as the policy, of any such rule as Pothier contends for, is as questionable as any which can be put in the dialectics of casuistry. (Story, 170).

nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day (34).

If the bailee, to use the Roman expression, be *in mōd*, that is, if a *legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time (35); or, unless the bailee have legally tendered the thing, and the bailor have put himself *in mōd* by refusing to accept it: this rule extends of course to every species of bailment.

[71]

“Whether in the case of a *valued loan*, or where the goods lent are *estimated at a certain price*, the borrower must be considered as bound *in all events* to restore either the things lent, or the value of them,” is a question upon which the civilians are as much divided as they are upon the celebrated clause in the law *Contractus*: five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament (36). D’Avezan supports the affirmative, and

Controversy
among the civi-
lians.

(34) A more simple case of tacit fraud, Dr. Story observes, would be, where the soldier borrowed the horse for the next day, concealing the fact of any expected battle, or of any intended use for that purpose; for, the lender might be fairly presumed, in such case, to lend for a journey, or for common use, and not for war.

(35) This case would not form an exception in the common law: the refusal would make the borrower liable for all accidents.

(36) In the common law, the controversy would turn wholly upon the construction of the words of the particular contract. The mere estimation of a price would not, of itself, settle the point whether the borrower took upon himself every peril, or any additional peril; but it would be construed as a mere precaution to avoid dis-

Pothier the negative; but the second opinion seems the more reasonable. The word *periculum*, used by Ul-

pute in case of a loss, unless some other circumstances raised a presumption that the parties intended something more. A case can scarcely be imagined where some circumstance giving a construction one way or other would not be found, to explain the reason for fixing the price.

Of the interest which the borrower has in the thing lent.—By the civil law, the lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing during the continuance of the bailment. Nay, the possession of the borrower is deemed the possession of the lender; so that an action for a trespass or conversion will lie in favour of the lender against a stranger who obtained a wrongful possession, or has made a wrongful conversion of the thing loaned. A mere gratuitous permission to a third person to use a chattel, does not, in the contemplation of the common law, take it out of the possession of the owner.

But, notwithstanding the borrower has no special property in the thing loaned, still it seems, that, if the injury done by a stranger is of such a nature that the bailee would be liable over to the lender for it, the latter may maintain an action of trespass and even trover, founded upon his possession, to recover damages; for, the mere possession of property, without title, is sufficient against a wrong-doer. (Bac. Abr. Trespass, C. 2). A simple bailee, said Chief Justice Best, has a sufficient interest to sue in trover, (see *Burton v. Hughes*, 9 Moore, 334; 2 Bing. 172). The same doctrine is laid down in Blackstone's Commentaries (2 Vol. 453), in very strong and decided terms.

There is a very loose note in the case of *Rich v. Aldred* (6 Mod. R. 216), which contains two positions said to have been laid down by Lord Holt on the subject of bailments, which may seem to require notice. One is, that, if A. bails the goods of C. to B., and C. brings detinue against B., the latter may plead the bailment to him by A., to be re-delivered to A., and so bring in A. as garnishee to interplead with C. It does not appear under what circumstances this opinion was expressed, and it is by no means clear, that, in all cases such a plea would be good, even for the purposes of interpleader, however the case may be in equity. Generally speaking, a bailee

pian, is in itself equivocal: it means *hazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the Roman lawyer in the passage which gave birth to the dispute. But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the Customary Provinces of France, or in England, a borrower can be chargeable for all events *without his consent unequivocally given*: If William, indeed, had said to Paul alternatively, "I promise, on my return to Oxford, *either* to restore your horse *or* to pay you thirty guineas," he must *in all events* have performed one part of this disjunctive obligation (*f*); but, if Paul had only said, "the horse which I lend you for this journey is fairly worth thirty guineas," no more could be implied from those words, than a design of preventing any future

[72]

(*f*) Palm. 551.

cannot be in a better position than the person who has bailed to him. The other position is, that, if A. bails goods to C., and afterwards transfers his whole right in them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailment is not thereby transferred to B. This position also seems questionable. For, if the bailment is a naked bailment, no special property passes to C.; and, what difficulty can there then be in A.'s transferring his property to a thing in the possession of his agent or bailee? Nothing is more common than a transfer of property by a principal of goods in the hands of his factor; and no one doubts that it is a valid transfer, subject only to any lien which the factor may possess. So, a transfer of goods while at sea, in the possession of the master of a ship, is deemed a valid transfer; and, if he refuses to deliver them, upon a due demand and refusal, the vendee may maintain a suit against him for the recovery of them or their value. There is great reason, therefore, to suspect the accuracy of the report in both respects.

difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence which the nature of the contract required.

Exceptions to
the rule.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use in which the lender has a *common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expense, for which purpose Philip lends a service of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract, *do ut facias*, than a proper *loan*.

[73]

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole* advantage of the *lender*, the borrower is answerable for *gross* neglect only; as, if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance; (but here again, the bailment is not so much a *loan* as a *mandate*); and, if the musician were to play with all due skill and exertion, but were to break or hurt the instrument, without any malice or very culpable negligence, he would not be bound to indemnify the amateur, as he was not in want of the instrument, and had no particular desire to use it. If, indeed, a poor artist, having lost or spoiled his violin or flute, be much distressed by this loss; and a brother musician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with Despeisses, a learned advocate of Montpellier, and writer on Roman law, that

the player may be less careful of it than any other borrower: on the contrary, he is bound, in conscience at least, to raise his attention even to a higher degree; and his negligence ought to be construed with rigour.

By the law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence* or the *presence* of the owner; for, says the divine legislator, "if a man borrow aught of his neighbour, and it be hurt or die, *the owner thereof not being with it*, he shall surely make it good; but, if the *owner* thereof *be* with it, he shall *not* make it good (*g*):" now, it is by no means [74] *certain* that the original word signifies the *owner*, for it *may* signify the *possessor*, and the law *may* import that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but, if it was intended that the borrower should always answer for casualties, *except in the case* (which must rarely happen) of *the owner's presence*, this exception seems to prove that no casualties were meant but such as *extraordinary* care might have prevented; for, I cannot see what difference could be made by the presence of the owner, if the force productive of the injury were wholly irresistible, or the accident inevitable.

An old Athenian law is preserved by Demosthenes, from which little can be gathered, on account of its generality and the use of an ambiguous word (*h*): it is understood by Petit as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The Athenians were, probably, satisfied

(*g*) Exod. xxii. 14, 15.

(*h*) Περὶ ὧν καθυφῆκε τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. Reiske's edition, 855. 3. Here the verb καθυφίναται may imply *slight*, or *ordinary*, neglect; or even *fraud*, as Petit has rendered it.

Mosaic and Attic laws.

with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

[75]
Law of pledges.

Doctrine of
Lord Coke de-
nied.

IV. As to the degree of diligence which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir Edward Coke, with whose opinion a similar liberty has before been taken in regard to a *depository*; for, that very learned man lays it down, that, "if goods be delivered to one as a *gage* or *pledge*, and they be *stolen*, he shall be discharged, because *he hath a property* in them: and, *therefore*, he ought to keep them *no otherwise than his own (i)*:" I deny the first proposition, the reason, and the conclusion (37).

(i) 1 Inst. 89. a. 4 Rep. 83 b.

(37) The *proposition* is, that, if goods in pledge are stolen, the pawnee is discharged. In support of this proposition, and in reply to Sir W. Jones, Dr. Story thus marshals the common law authorities:—In *Vere v. Smith*, (1 Vent. 121), which was a suit upon a bond to account, the defendant pleaded that he locked up the money in his master's warehouse, and it was stolen from thence, (not saying without any default on his part), and it was adjudged that the plea was a good bar to the action, and a sufficient accounting within the condition of the bond. In the case cited from Fitzherbert's Abridgment, in 8 Edw. 2, (Fitz. Abr. Detinue, 59), where goods were locked in a chest and left with the bailee, and the owner kept the key, and the goods were stolen, the bailee was held to be discharged. The whole reasoning of Lord Holt, in *Coggs v. Bernard* (2 Ld. Raym. 909, 912), proceeds upon the ground that theft is not presumptive of negligence. In case even of a gratuitous loan, he says, that, "if the bailee puts the horse lent into his stable, and he is stolen from thence, the bailee is not answerable; but, if he leaves the stable door open, and thieves steal the horse, he is chargeable, because the neglect gave the thieves occasion to steal the horse." The case found in the

Since the bailment which is the subject of the present article is beneficial to the *pawnee* by securing the pay-

Book of Assise, (29 Lib. Assisarum, 28), and cited by Sir William Jones in page 77, 78, is directly in point in favour of Lord Coke's opinion. The action was detinue for a hamper which had been bailed, and the bailee pleaded that it had been delivered to him in gage for a certain sum of money; that he had put it among his other goods; and that all the goods had been stolen together from him. On that occasion, the Chief Justice said, that, "If a man bails me goods to keep, and I put them among my own, I shall not be charged if they be stolen." And the plaintiff was driven to reply, that "he had tendered the money before the stealing of the goods, and that the bailee (the creditor) refused to accept the money." To this case Sir William Jones gives no other answer than that he suspects that by theft in this report was meant robbery; as Brooke, in his Abridgment (Bailm. 7), had abridged the case with a marginal note, "*Quant les biens sont robbez.*" But, as we have the original case, we have just as good means to judge of its import as Brooke; and the language of the Book of Assise is, that it was a case of theft. It is highly improbable, that, in a technical sense, there could have been any robbery, that is, a stealing of the hamper and other goods from the person of the bailee, or in his presence, with force or terror. The language of the case does not lead to any such conclusion; and the nature of the article, as well as the language of the court, seems to point to it as a case of mere theft. The plea asserts the hamper to have been put among the other goods of the pawnee; which would seem to exclude the notion that they were in his personal presence. In the modern case of *Finucane v. Small*, (1 Esp. R. 315), Lord Kenyon held, that a bailee of goods kept for hire was not liable for a theft committed by his servants, although there were some prior suspicious circumstances impeaching their fidelity. If, indeed, the circumstances of the case prove that the theft has been occasioned by negligence or want of proper caution, there the pawnee may properly be held responsible.

The *reason* given is, that the pawnee has a special property therein. This, Sir William Jones says, is no reason at all, for, every bailee has a temporary qualified property. Dr. Story, in reply to Sir William Jones, denies the latter assertion; for, says he, neither

[76]

ment of his debt, *and* to the *pawnor* by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed, to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect (*k*). This is expressly holden by Bracton; and, when I rely on his authority, I am perfectly aware that he copied Justinian almost word for word, and that Lord Holt, who makes considerable use of his Treatise, observes three or four times, "that he was an *old* author (*l*);" but, although he had been a civilian, yet he was also a great common lawyer, and never, I believe, adopted the rules and expressions of the Romans, except when they coincided with the laws of England in his time: he is certainly the *best* of our juridical classics; and, as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but, if it remain unimpeached by any later decision, it is not only equally binding with the

(*k*) Bract. 99. b.(*l*) Ld. Raym. 915, 916, 919.

depositories, nor mandataries, nor borrowers, have any special property; though, as they have a lawful possession, and are answerable over, they may maintain an action for any tort done to the thing bailed during the time of their possession. The reason given by Lord Coke, he also observes, is not the true reason; but the true reason is, as Lord Holt says, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods.

The *conclusion*, that, therefore, the bailee ought to keep the goods merely as his own, Dr. Story admits to be open to the criticism made on it by Sir William Jones; though, he observes, that, where a bailee takes the same care of the pledge as he does of his own goods, and both are lost by theft, that furnishes *prima facie* a presumption of ordinary diligence. (Story, 225).

most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages. The doctrine in question has the full assent of Lord Holt himself, who declares it to be "*sufficient* if the pawnee use *true* and *ordinary* diligence for restoring the goods, and that, so doing, he will be indemnified, and, notwithstanding the loss, shall resort to the pawnor for his debt." Now, it has been proved, that "a bailee cannot be considered as using *ordinary* diligence, who suffers the goods bailed to be taken by *stealth* out of his custody (m);" and it follows, that "a pawnee shall *not* be discharged, if the pawn be simply *stolen* from him;" but, if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the Roman institutes, which Bracton has nearly transcribed, by no means convinces M. Le Brun that a *pawnee* and a *borrower* are not responsible for *one and the same* degree of negligence; and it is very certain that Ulpian, speaking of the *actio pignoratitia*, uses these remarkable words: "Venit in hac actione et dolus et culpa *ut* in commodato, venit et custodia; vis major non venit." To solve this difficulty, Noodt had recourse to a conjectural emendation, and supposes *ut* to have been inadvertently written for *at*; but, if this was a mistake, it must have been pretty ancient, for, the Greek translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occasion for so hazardous a mode of criticism. Ulpian has not said, "*talis culpa qualis in commodato*;" nor does the word *ut* imply an *exact* resemblance: he meant, that a pawnee was answerable for *neglect*, and gave the first instance that occurred of another contract, in which the

[77]

Conjectural criticism of Noodt.

(m) P. 44, n. (o).

party was likewise answerable for *neglect*, but left the *sort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himself expressly mentions *pignus* among other contracts *reciprocally useful*, and distinguishes it from *commodatum*, whence the borrower *solely* derives advantage (*n*).

Case in the
Book of Assise.

[78]

It is rather less easy to answer the case in the Book of Assise, which seems wholly subversive of my reasoning, and, if it stand unexplained, will break the harmony of my system (*o*); for, there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him *in gage* for a certain sum of money; that he had put it among his other goods; and that all together had been *stolen* from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, "that he *tendered* the money before the *stealing*, and that the creditor refused to accept it," on which fact issue was joined; and the reason assigned by the Chief Justice was, that, "if a man bail goods to me *to keep*, and I put them among my own, I shall not be charged if they be *stolen*." To this case I answer: first, that, if the court really made no difference between a *pawnee* and a *depository*, they were indubitably mistaken; for which assertion I have the authority of Bracton, Lord Holt, and St. German, who ranks the taker of a *pledge* in the same class with a *hirer* of goods (*p*); next, that, in a much later case, in the reign of Hen. VI., where a *hiring of custody* seems to be meant, the distinction between a *theft* and a *robbery* is taken agreeably to the Roman law (*q*); and, lastly, that, although, in the strict propriety of our English language, to *steal* is to

(*n*) Before, p. 16.

(*o*) 29 Ass. pl. 28.

(*p*) Doct. and Stud. dial. 2, chap. 38.

(*q*) Before, p. 44, note (*o*).

take *clandestinely*, and to *rob* is to *seize by violence*, corresponding with the Norman verbs *embleer* and *robber*, yet those words are sometimes used inaccurately; and I always suspected that the case in the Book of Assise related to a *robbery*, or a taking *with force*; a suspicion confirmed beyond any doubt by the judicious Brooke, who abridges this very case with the following title in the margin, “Que serra al perde, quant les biens sont *robbes* (r):” and in a modern work, where the old cases are referred to, it appears to have been settled in conformity to them and to reason, “that, if the pawn be laid up, and the pawnee be *robbed*, he shall not be answerable (s):” but Lord Coke seems to have used the word *stolen* in its proper sense, because he plainly compares a pawn with a deposit.

[79]

If, indeed, the thing pledged be taken *openly and violently* through the *fault* of the pledgee, he shall be responsible for it; and, after a *tender* and *refusal* of the money owed, which are equivalent to actual *payment*, *the whole property is instantly revested in the pledgor*, and he may consequently maintain an action of *trover* (t): it is said in a most useful work, that, by such tender and refusal, the thing pawned “ceases to be a pledge and becomes a *deposit* (u);” but this must be an error of impression; for, there can never be a deposit without the owner’s consent, and a *depository* would be chargeable only for *gross* negligence, whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable *in all possible events* to make good the thing lost, or to relinquish his debt (w).

[80]

(r) Abr. tit. Bailment, pl. 7.

(s) 2 Salk. 522.

(t) 29 Ass. pl. 28. Yelv. 179. Ratcliff and Davis.

(u) Law of Nisi Prius, 72. The error here pointed out is corrected in the subsequent editions, by the omission of the words quoted above.—T.

(w) Ld. Raym. 917.

Lord Coke's
reasons con-
tested.

[81]

The reason given by Coke for his doctrine, namely, "because the pawnee has a *property* in the goods pledged," is applicable to every other sort of bailment, and proves nothing in regard to any *particular* species; for, every bailee has a temporary *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them (*x*). By the Roman law, indeed, "even the possession of the depositary was holden to be that of the person depositing;" but with us the general bailee has unquestionably a *limited* property in the goods intrusted to his care: he may not, however, *use* them on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies, as the thing is likely to be better, or worse, or not at all affected, by usage; since, if Caius deposit a *setting-dog* with Titius, he can hardly be supposed unwilling that the dog should be used for part-ridge-shooting, and thus be confirmed in those habits which make him valuable; but, if *clothes* or *linen* be deposited by him, one can scarce imagine that he would suffer them to be worn; and, on the other hand, it may justly be inferred that he would gladly indulge Titius in the liberty of using the *books* of which he had the custody, since even moderate care would prevent them from being injured. In the same manner it has been holden, that the pawnee of goods which will be *impaired* by usage, cannot use them; but it would be otherwise, I apprehend, if the things pawned actually *required* exercise and a continuance of habits, as sport-

(*x*) Year B. 21 Hen. VII. 14 b. 15 a.

ing-dogs and horses: if they cannot be hurt by being worn, they may be used, but *at the peril* of the pledgee (38); as, if chains of gold, ear-rings, or bracelets,

(38) It may well be doubted whether there is any foundation for the doctrine which is affirmed both by Mr. Justice Buller and by Sir Wm. Jones, that, in case of a deposit of things which are not hurt by use, the depositary may at his peril use them. The language of the authority, which is principally relied on for its support, does not, when properly construed, justify any such conclusion. In *Coggs v. Bernard* (2 Ld. Raym. 909, 916, and see Appendix), Lord Holt says, if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c. But, if it be such as will never be the worse, as, if jewels for this purpose were pawned to a lady, she might use them. But then she must do it at her own peril. For, whereas, if she keeps them locked up in her cabinet, if her cabinet is broken open and the jewels taken from thence, she would be excused; if she wears them abroad and is there robbed, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, *and, as such, is not liable to be used*. Now, the reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right. And, unless the contrary is expressly agreed, it may fairly be presumed that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby exposed to unnecessary and extraordinary perils. The true rules deducible from the common law authorities, as to how far the pawnee is entitled to use the pawn, seem to be the following:—1. If the pawn is of such a nature that the due preservation of it requires some use, there it is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee. 2. If the pawn is of such a nature, that it will be the worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee. 3. If the pawn is of such a nature that the keeping is a charge to the pawnee, as, if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense (as it is said) for the keeping. 4. If the use will be beneficial to the pawn, or indifferent, there it seems that the pawnee may use it, as, if the pawn is of a setting-dog, it may well be presumed that

[82]

be left in pawn with a lady, and she wear them at a public place, and be *robbed* of them on her return, she must make them good: "if she keep them in a bag," says a learned and respectable writer, "and they are *stolen*, she shall not be charged (*y*);" but the bag could hardly be taken *privately and quietly* without her omission of *ordinary* diligence; and the manner in which Lord Holt puts the case establishes my system, and confirms the answer just offered to the case from the Year-Book; for, "if she keep the jewels," says he, "*locked up* in her cabinet, and her cabinet be *broken open*, and the jewels taken thence, she will not be answerable (*z*)."
Again; it is said, that, where the pawnee is at any expense to maintain the thing given in pledge, as, if it be a horse or a cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge (*a*); and this doctrine must be equally applicable to a general bailee, who ought neither to be injured or benefited in any respect by the trust undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits, indeed, both the pawnee and the depositary to milk the cows delivered to them, but requires them to account with the respective owners for the value of the milk and calves, deducting the reasonable

(*y*) Law of Nisi Prius, 72—(39).

(*z*) Ld. Raym. 917.

(*a*) Ow. 124.

the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which make him valuable. So, books which will not be injured by a moderate use, may be read, examined, and used by the pawnee. 5. But, if the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted. (Story, 221).

(39) See *Finucane v. Small*, 1 Esp. N. P. C. 315, ante, p. 75, n. 37.

charges for their nourishment (b). It follows from these remarks, that Lord Coke has assigned an inadequate reason for the degree of diligence which is demanded of a pawnee; and the true reason is, that the law requires nothing *extraordinary* of him.

But, if the receiver in pledge *were* the only bailee who had a *special property* in the thing bailed, it could not be logically inferred, "that, *therefore*, he ought to keep it merely *as his own*;" for, even if Caius have an *absolute* undivided property in goods jointly or in common with Septimius, he is bound by rational, as well as positive law, to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns; since every man ought to use *ordinary* diligence in affairs which interest *another* as well as himself: "*Aliena negotia*," says the emperor Constantine, "*exacto officio geruntur* (c)."

[83]

The conclusion, therefore, drawn by Sir Edward Coke, is no less illogical than his premises are weak. But here I must do M. Le Brun the justice to observe, that the argument on which his whole system is founded, occurred likewise to the great oracle of English law; namely, that a person who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was Le Brun's hypothesis, he has done little more than adopt the system of Godefroi, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts (40).

(b) Poth. Depot, n. 47. Nantissement, n. 35. (c) C. 4. 35. 21.

(40) The more extensive plan of Dr. Story's work has admitted

Pledges for debt are of the highest antiquity; they were used in very early times by the roving Arabs, one

a great many topics which cannot properly be introduced by way of note or comment on the essay. But the most useful of them I think will be acceptable, and I therefore introduce those relating to pawns here as a supplement.

In our language the term pawn or pledge is confined to personal property, and, where real property is transferred, by a conveyance of the title, as a security, we commonly denominate it a mortgage.

A mortgage of *goods* is distinguishable from a mere pawn. In a mortgage, the whole legal title passes conditionally to the mortgagee. But, in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger. (*Lickbarrow v. Mason*, 6 East, 21).

To the validity of a pledge, it is not indispensable that the pledge should belong to the pledger; it is sufficient if it is pledged with the consent of the owner; and, even without the consent of the owner, the pledge would be valid as between the parties. By the pledge of a thing, not only the thing itself is pledged, but also, as accessory, the natural increase thereof.

If the pawnor has only a limited title to the thing, as, for life or years, he may still pawn it to the extent of his title; but, when that expires, the pawnee must surrender it to the person who succeeds to the ownership. (*Hoare v. Parker*, 2 T. R. 376).

In respect to negotiable instruments for money, the party lawfully in possession of them, although not the owner, may in general pledge them, as well as sell them absolutely, so as to bind the rights of the owner. But, as to negotiable securities for goods, as, bills of lading, the common law is otherwise, and such a party could not make a valid pledge of these until a recent statute. (4 Geo. 4, c. 83. 6 Geo. 4, c. 94).

To constitute a pledge there must be an actual delivery. Until the delivery, the pledgee acquires no right of property in the thing. (*Bac. Abr. Bailment*, B. 2 Roll. R. 439). What will amount to a delivery is a question of law. It need not be an actual manual delivery. Thus, goods at sea may be passed in pledge by a transfer of the muniments of title, as, by a transfer of the bill of lading, an assignment, &c. So, goods in a warehouse may be transferred by a symbolical delivery

of whom finely remarks, "that the life of man is no more than a *pledge* in the hands of destiny;" and the

of the key thereof. (*Atkinson v. Maling*, 2 T. R. 462). So, if the pledgee has the thing already in possession, as a deposit, &c., there the very contract transfers to him, by operation of law, a virtual possession as a pledge, the moment the contract is completed.

And, as possession is necessary to complete the title by pledge, so, the delivery back of the possession of the thing with the consent of the pledgee terminates his title: unless such delivery is for a temporary purpose merely, under an agreement.

As to the persons by and between whom the contract may be made.—All persons having a general capacity to contract may enter into this engagement. But, persons under disabilities are affected by a like incapacity in this as in other cases of contract. Married women, idiots, lunatics, and persons non compos, from age, debility, or otherwise, are wholly unable to make a valid pledge, or indeed to receive one. But, in respect to minors, it may be otherwise; for, their contracts are generally not void, but voidable merely, and are to be avoided only at their own election.

As to the rights of the pawnee.—In virtue of the pawn, he acquires, by the common law, a special property in the thing, (2 Bl. Com. 396. *Jones*, 80. *Moses v. Conham*, Ow. R. 123. *Ratcliffe v. Davis*, 1 Bulst. 29. *Yelv.* 178. *Cro. Jac.* 244. *Coggs v. Bernard*, 2 Ld. Raym. 909, 916. *Bac. Abr. Bailm. B.*), and is entitled to the possession of it exclusively during the time and for the objects for which it is pledged. If the owner should wrongfully repossess himself of the pawn, the pawnee may maintain a suit for the restitution of the thing itself, or for damages, at his election. If it should be taken from his possession by a stranger, he may sue the stranger in like manner. (2 Saund. R. 47, *Wms. n. b*). And, in a suit for damages, the pawnee may recover against a stranger the full value of the thing, although it is pledged to him for less, as he will be answerable over to the owner for the excess.

If there are any subsequent accessorial engagements, which either tacitly or expressly are by the parties attached to the pledge, the pledgee has a title and right of possession co-extensive with the new engagements. (*Prec. Ch.* 419. 2 Vern. 691). But, the mere existence of a former debt due to the pledgee does not authorise him to

salutary laws of Moses, which forbade certain imple-
ments of husbandry and a widow's raiment to be given

detain the pledge for that debt, when it has been put into his hands for another debt or contract, unless there is some presumption that such was the intention of the parties. (*Green v. Farmer*, 4 Burr. R. 2214. 6 T. R. 258. 7 East, 224). The rule in such cases strictly applies, that the contract is to govern the rights of the party—"Modus et conventio vincunt legem." The pledge applies not only to the debt or other engagement, but also to all the incidental charges and expenses. If, for instance, a pledge is for a debt, it covers the interest upon the debt; and, if the pawnee is at any expense about the pledge, that also is covered.

Another right resulting by the common law from the contract of pledge is, the right to sell the pledge when there has been a default in the pledger in complying with his engagement. Such a default does not divest the general property of the pawner, but still leaves in him a right of redemption. But, if the pledge is not redeemed within the stipulated time by a due performance of the contract for which it is a security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity. And, if there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to a prompt fulfilment of the engagement; and, if the pawner neglects or refuses to comply, the pawnee may, upon due demand, and notice to the pawner, require the pawn to be sold.

The law of England, in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. (*Glanville*, lib. 10, c. 1. 1 *Reeve's Hist.* 161, 162). But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale, or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledger. And, in the latter case, if the sale is *bonâ fide* and reasonably made, it will be equally obligatory. (*Pothener v. Dawson*, 1 Holt, N. P. C. 385. *Tucker v. Wilson*, 1 P. Wms. 261; 1 Bro. Parl. Cas. 494. *Lockwood v. Ewer*, 9 Mod. 278. 3 Atk. 303). The case of pawns seems distinguishable in this respect from the ordinary case of liens; for, a mere right of lien is not understood to carry with it any right of sale to secure an

in pawn, deserve to be imitated as well as admired. The distinction between *pledging*, where possession is trans-

indemnity. The foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; (Gibbs, C. J., in *Pothener v. Dawson*, 1 Holt, N. P. C. 385); but, in a case of lien nothing is supposed to be given but a right of retainer.

If several things are pledged, each is deemed liable for the whole debt or other engagement. If one of them perishes by accident or casualty, without default of the pledgee, he has a right over all the residue for his whole debt or other duty. (*Ratcliffe v. Davis*, Yelv. 178; Bac. Abr. Bailm. B.; Anon. Salk. R. 522). And the pledgee may sell, not only the things pledged, but all their increments. But, when once he has obtained an entire satisfaction, he can proceed no further; and, if there is any surplus, it belongs to the pledger. If the things pawned are insufficient to pay the debt or other duty, the deficiency continues a personal charge on the debtor or other contracting party, and may be recovered accordingly. (*South Sea Company v. Duncomb*, 2 Str. 919). And the pledgee may release one of the things pawned without affecting any of his rights to the others.

The possession of the pawn does not suspend the right of the pawnee to proceed personally against the pawner for his whole debt or other engagement without selling the pawn, for it is only a collateral security. (2 Str. 919. Bac. Abr. Bailment, B. Anon. 12 Mod. 564. Holt, N. P. C. 461). If the pawner, in consequence of any default or conversion of the pawnee, has recovered back the pawn or its value, still the debt remains, and is recoverable, unless in such prior action it has been deducted. (*Ratcliffe v. Davis*, Yelv. 179. Bac. Abr. Bailm. B). And it seems, that, by the common law, the pawnee, in such an action for the value, has a right to have the amount of his debt recouped in the damages.

As to the right of the pledgee to alienate the property.—It is very certain, that, at the common law, he cannot alienate the property absolutely, nor beyond the title actually possessed by him, unless in very special cases. (*De Mainbray v. Metcalf*, 2 Vern. 691. 1 Eq. Cas. Ab. 324. Prec. Chan. 419. *Hartop v. Hoare*, 3 Atk. 44. *Pickering v. Busk*, 15 East, 38). But, if the pledge is of mere current coin, or negotiable securities, capable in their own nature of

ferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally Attic; but scarce

passing by delivery, there, if the pledgee sells to a bona fide purchaser without notice, the latter acquires an absolute property in the pledge; for, in a concurrence of equal rights, he who has trusted the party, and enabled him to impose on another, shall be bound by his acts. Thus, if the pledge is of certificates of stock, which may pass by delivery, a bona fide purchaser, or subsequent pledgee, may hold the stock against the real owner. The like rule applies to negotiable securities. (*Collins v. Martin*, 1 Bos. & Pul. 648. *Peacock v. Rhodes*, Doug. R. 633. 3 Atk. 46. 1 Burr. 452). But, if a negotiable note, or other security, contains in it any intimation that it belongs to another person, or is for his account, there it is incapable of being pledged for the use of the holder. (*Treuttel v. Barandon*, 8 Taunt. R. 100). And the rule, in respect to negotiable securities, seems, at the common law, confined to cases of securities which pass as money, and not to apply to mercantile securities, such as dock-warrants, bills of lading, &c.; unless, indeed, the owner should have enabled the consignee so to act, by holding him out to the world exclusively as owner, for then the former might be bound by the pledge. (*Newsom v. Thornton*, 6 East, 17. *Martini v. Coles*, 1 M. & S. 140. *Shipley v. Keymer*, 1 M. & S. 484. *Pickering v. Busk*, 15 East, 38. *Queiroz v. Trueman*, 5 D. & R. 192, 3 B. & C. 342). However, by the statutes 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, a pledge, in such cases, is rendered valid.

The pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell and assign all his interest in the pawn; or he may convey the same interest conditionally by way of pawn to another person; without in either case destroying or invalidating his security. But, if the pledgee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he were absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question which, under such circumstances, would seem to admit of controversy, is, whether the creditor would be entitled to retain the pledge until the original debt was discharged, or whether

any part of the Athenian laws on this subject can be gleaned from the ancient orators, except what relates to bottomry, in five speeches of Demosthenes.

the owner might recover the pledge as if the case was a naked tort without any qualified right in the first pledgee.

Previously to the passing of the recent acts of parliament relating to factors and agents, the doctrine established by the decisions of the courts was, that a factor having a lien on goods for advances, or for a general balance, had no right to pledge the goods, and could convey no title to the pledgee. (*Daubigny v. Duval*, 5 T. R. 604. *Newsom v. Thornton*, 6 East, 17. *M'Combie v. Davies*, 7 East, 5. *Martini v. Coles*, 1 M. & S. 140. *Shipley v. Keymer*, 1 M. & S. 484. *Jolly v. Rathbone*, 2 M. & S. 298. *Pickering v. Busk*, 15 East, 44. *Queiroz v. Trueman*, 5 D. & R. 192, 3 B. & C. 342). The effect of this doctrine was, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer was deemed wholly tortious, so that the principal might sue for and recover the pledge without making any allowance or deduction whatsoever for the debt due by him to the factor. The inconvenience, not to say harshness, of the latter part of the doctrine has been very severely felt. And, what renders it somewhat objectionable in principle is, that it is admitted that the factor has a right to assign or deliver over the goods as a pledge or security to the extent of his lien thereon, if he avowedly confines the assignment or pledge to that, and does not exceed his interest. (*Mann v. Shiffner*, 2 East, 523. *M'Combie v. Davies*, 7 East, 6. *Kuckein v. Wilson*, 4 B. & Ald. 443). Now, if the right or lien of the factor is capable of assignment or transfer at all, as an interest or right adhering to the goods, and entitled to accompany the possession, there seems great difficulty in maintaining, that, because the title to the pledge is infirm in part, upon a general transfer or a general pledge, it shall be bad in toto, notwithstanding the pledgee may be an innocent bona fide holder. The general denial of the right to pledge by factors does not appear to have approved itself to the minds of Lord Eldon and Lord Ellenborough, (*Pulteney v. Kymer*, 3 Esp. N. P. C. 182. *Pickering v. Busk*, 15 East, 44), and it has been suggested by Mr. Bell (1 Bell's Com. 486) that it probably had its origin in mistake. However, by the acts above referred to (4 Geo. 4, c. 83, and 6 Geo. 4, c. 94), parliament has at length interfered, and placed

Turkish law.

I cannot end this article without mentioning a singular case from a curious manuscript preserved at Cam-

the doctrine on this subject, with relation to factors and agents at least, upon a far more rational foundation than it was placed by the decisions of Westminster Hall. To state the provisions of these acts would lead to too long a digression into topics more properly belonging to a treatise on the law of principal and agent.

As to the duties of the pawnee.]—Besides the duty of exercising due care in the custody of the pawn, another duty of the pawnee is, to return the pledge and its increments, if any, after the debt or other duty has been discharged. (*Isaac v. Clarke*, 2 Bulst. 306). Of course, this duty, by the common law, is extinguished when the pledge is lost by casualty or other unavoidable accident, or it perishes through its own intrinsic defects, without the default of the pawnee; (*Coggs v. Bernard*, 2 Ld. Raym. 909); and the same rule applies when the pawn is lost by robbery, or by superior force, or even by theft, if the pawnee has exercised reasonable diligence. The same rule will be found in the civil law and in the law of continental Europe. It is not, however, sufficient for the pawnee to allege that there has been such a loss. It must be established by proper proofs. And, it would seem, that, in the civil and foreign law, the onus probandi is on the pawnee to establish the loss to be by such superior force, or intrinsic defect. The common law does not, probably, differ, when a suit is brought for the restitution of the pawn, and it would then be incumbent on the pawnee to give some evidence of a loss by casualty, or superior force, independent of his own statement. (2 Salk. 655. 1 T. R. 33. *Isaac v. Clarke*, 2 Bulst. 306). But, if a suit should be brought against the pawnee for a negligent loss of the pawn, there it would be incumbent upon the plaintiff to support the allegations of his declaration by proper proofs, and the onus probandi, in respect to negligence, would be on him. (*Cooper v. Barton*, 3 Camp. N. P. C. 5. *Harris v. Packwood*, 3 Taunt. 264. *Marsh v. Horne*, 8 D. & R. 223, 5 B. & C. 322).

If the party who pledged the goods was not the owner of them, the pawnee may defend himself by showing that he has delivered over the goods to the real owner, unless the pledger has a special property which he is entitled, under the circumstances, to assert against the owner. And, if the pledger holds the pledge merely as a pledge from the owner, the second pledgee may discharge himself

bridge, which contains a collection of queries in Turkish, together with the decisions or concise answers of the—

from any obligation to the owner by delivering it up to his own pledger at any time before an offer to redeem be made by the owner.

The pawnee makes himself responsible for all losses and accidents whenever he has done any act inconsistent with his duty, or has refused to perform his duty. If, therefore, the pawner makes a tender of the amount of the debt for which the pawn is given, and the pawnee refuses to receive it or to redeliver the pledge, the special property which he has in the pledge is determined, and he is thenceforth treated as a wrong-doer, and the pawn is at his sole risk. And the same rule applies to all cases of a misuser or conversion of the pawn by the pawnee.

As to the rights of the pawner.—If the pledge is conveyed by way of mortgage, so as to pass the legal title, and it is not redeemed at the stipulated time, the title of the pledgee becomes absolute at law, and the pledger has only a remedy in equity. If, however, the transaction is not a transfer of ownership, but a mere pledge, as the pledger has never parted with the general title, he may, at law, redeem, notwithstanding he has not strictly complied with the condition of his contract. (Com. Dig. Mortgage, B. Glanville, lib. 10; ch. 6. 1 Reeve Hist. 161). If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and, upon tender of the debt, he may, at any time, be compelled to restore it; for prescription, or the statute of limitations, does not run against it. (Kemp v. Westbrook, 1 Vez. 278). However, after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished; and the property will be held to belong absolutely to the pawnee. Where, however, no time of redemption is fixed by the contract, then, upon the general principles of law, the pawner has his whole life to redeem, (Com. Dig. Mortgage, B. Yelv. 178. Bac. Abr. Bailm. B.), unless he is previously quickened, as he may be, by the pawnee, through the instrumentality of a court of equity, or, it is said, by a notice *in pais* (sed quære) to the party. A question has arisen, whether, if the pawner dies without redeeming, the right survives to his personal representatives. In the case of Ratcliffe v. Davies (Yelv. 178), it seems to have been thought by the

Mufti at Constantinople: it is commonly imagined that the Turks have a translation in their own language of the

court, that the right expired with the pawner's life. However, there have been cases in equity, in which the right has been enforced in favour of the representatives of the pawner; and this seems, according to modern opinions, the true doctrine. (*Demandray v. Metcalfe*, Prec. Ch. 420. 2 Vern. 691. *Vanderzee v. Willes*, 3 Bro. C. R. 21). If the pawnee dies before redemption, the pawner may still redeem against his representatives. (Com. Dig. Mortgage, B.). If at the time when the pledger applies to redeem, the pledge has been sold by the pledgee, without any proper notice to the former, no tender of the debt due need be made before bringing an action; for, the party has incapacitated himself to comply with his contract to return the pledge. And the same rule applies where the pledgee dispenses with a tender, as, if he refuses under any circumstances to restore the pledge. But, if such an action is brought, the pledgee may, it is said, recoup his debt in the damages.

Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case the vendee will be substituted for the pledger, and the pledgee will be bound to allow him to redeem, and to account with him for the pledge and its proceeds; and, if he refuses, an action at law, it is said, will lie at his suit for damages, as well as a bill in equity to compel a redemption and account. (*Kemp v. Westbrook*, 1 Vez. 278).

As the general property of goods pawned remains in the pawner, and the pawnee has a special property only, not only may the latter maintain an action against a stranger for any injury done to it, or any conversion of it, but the former also. (*Bac. Abr. Trover*, C. 2 Roll. Abr. 569, pl. 5). And, where a stranger comes into possession under a wrongful title from the pawnee, the owner having a right to consider the bailment, if not for all, at least for many purposes, at an end, may recover it against the stranger, and hold him liable for damages. Thus, if an agent or factor pledged the goods of his principal, the owner might recover them from the pledgee, previously to the recent acts, by which such pledges are made valid. (*Newsom v. Thornton*, 6 East, 17. *Martini v. Coles*, 1 M. & S. 140. *McCombie v. Davies*, 6 East, 153). But, where there is any injury or conversion by a stranger, for which an action lies both by the pawner and pawnee, it is said, that a recovery by either ousts the other of his right to recover, for there can-

Greek code, from which they have supplied the defects of their Tartarian and Arabian jurisprudence (*d*): but I have not met with any such translation, although I admit the conjecture to be highly probable, and am persuaded that their numerous treatises on Mahomedan law are worthy, on many accounts, of an attentive examination. The case was this: "Zaid had left with Amru divers goods in pledge for a certain sum of money, and some *ruffians*, having entered the house of Amru, took away his own goods, together with those pawned by Zaid." Now we must necessarily suppose that the creditor had by *his own fault* given occasion to this robbery; otherwise, we may boldly pronounce that the Turks are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are totally repugnant to natural justice; for, the party proceeds to ask, "whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, Zaid could legally demand the balance of Amru;" to which question, the great law officer of the Othman court answered with the brevity usual on such occasions, Olmaz, *it cannot be* (*e*). This

[85]

(*d*) Duck de Auth. Jur. Civ. Rom. I. 2. 6.

(*e*) Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. Hywel Dda. lib. 2, c. 2, s. 29, note x. It may *possibly* be the usage in Turkey to stipulate "ut amissio pignoris liberet debitorem," as in C. 4. 24. 6.

not be a double satisfaction. (Bac. Abr. Trover, C. Rooth v. Wilson, 1 B. & Ald. 59. Sed qu.) Goods pawned are not liable to be taken in execution in an action against the pawner, at least not until the bailment is terminated by payment, or other extinguishment of the pawnee's title. This is the rule in cases of execution at the suit of private persons. But, it would seem, that, in case of the crown, the pawn might be taken, on satisfaction of the debt to the pawnee, or taken and sold subject to his right.

custom, we must confess, of proposing cases both of law and conscience, under *feigned* names to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality, and to save the charges of litigation.

Law of hiring.

V. The last species of bailment is by no means the least important of the five, whether we consider the infinite convenience and daily use of the contract itself, or the variety of its branches, each of which shall now be succinctly, but accurately, examined.

Hiring of a thing.

[86]

I. *Locatio*, or *locatio-conductio, rei*, is a contract by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price of the hiring; so that, in truth, it bears a strong resemblance to the contract of *emptio-venditio*, or *sale*: and, since it is advantageous to *both* contracting parties, the harmonious consent of nations will be interrupted, and one object of this essay defeated, if the laws of England shall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the most recent publication that I have read on any legal subject, it is expressly said, "that the hirer is to take *all imaginable* care of the goods delivered for hire (*f*): the words *all imaginable*, if the principles before established be just, are too strong for practice, even in the strict case of *borrowing*; but, if we take them in the mildest sense, they must imply an *extraordinary* degree of care; and this doctrine, I presume, is founded on that of Lord Holt, in the case of *Coggs and Bernard*, where the great judge lays it down, "that, if goods are let out for a *reward*, the *hirer* is bound to the *utmost* diligence, such as the *most diligent*

Lord Holt's doctrine explained.

(*f*) Law of Nisi Prius, 3rd edition, corrected, 72.

father of a family uses (g)." It may seem bold to controvert so respectable an opinion; but, without insisting on the palpable injustice of making a *borrower* and a *hirer* answerable for precisely the *same* degree of neglect, and without urging that the point was not then before the court, I will engage to show, by tracing the doctrine up to its real source, that the dictum of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single Latin word.

[87]

In the first place, it is indubitable that his lordship relied *solely* on the authority of Bracton, whose words he cites at large, and immediately subjoins, "*whence it appears*," &c.: now the words, "*talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet*," on which the whole question depends, are copied exactly from Justinian (*h*), who informs us, in the proeme to his Institutes, that his decisions in that work were extracted *principally* from the Commentaries of Gaius; and the epithet *diligentissimus* is, in fact, used by this antient lawyer (*i*), and by him alone, on the subject of hiring; but Gaius is remarked for writing with energy, and for being fond of using *superlatives* where all other writers are satisfied with *positives* (*k*); so that his forcible manner of expressing himself, in this instance, as in some others, misled the compilers employed by the Emperor, whose words Theophilus rendered more than literally, and Bracton transcribed; and thus an epithet, which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken

(g) Ld. Raym. 916.

(h) Bract. 62. b. Justin. Inst. 3. 25. 5. where Theophilus has ὁ σφοδρὰ ἐπιμελεστάτος.

(i) D. 19. 2. 25. 7.

(k) Le Brun, p. 93.

[88]

harmony of the Pandects with the Institutes, which, together with the Code, form *one connected work* (l), and, when properly understood, explain and illustrate each other; nor is it necessary, I conceive, to adopt the interpretation of M. De Ferriere, who imagines that both Justinian and Gaius are speaking only of cases, which *from their nature* demand *extraordinary care* (m).

Rules and remarks.

There is no authority, then, against the rule which requires of a *hirer* the same degree of diligence that *all prudent men*, that is, *the generality of mankind*, use in keeping their own goods (41), and the just distinction

(l) Burr. 426.

(m) Inst. vol. v. p. 138.

(41) This principle was recognised in *Dean v. Keate*, 3 Camp. N. P. C. 4. There, a horse, which the plaintiff had let to the defendant, being taken ill, the defendant himself prescribed medicines for it; the medicines were not proper, and the horse died. Lord Ellenborough said—"Had the defendant called in a farrier, he would not have been answerable for the medicines the latter might have administered; but, when he prescribes himself, he assumes a *new degree* of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a *prudent man towards his own horse*, and was, in consequence, guilty of a breach of the *implied* undertaking he entered into when he hired the horse from the plaintiff."

From the above rule it follows, that, if a man hires a horse, he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food. And, if he does so, and the horse in such reasonable use is lamed or injured, he is not responsible for any damages. If two persons jointly hire a horse and chaise on joint account, both are answerable for any misconduct or negligence of either in driving, or in any other want of proper care. But it would be otherwise where one is the sole hirer, and the other merely invited to ride; the hirer, in such a case, alone being responsible. (*Davy v. Chamberlain*, 4 Esp. N. P. C. 229).

In an action for the negligence of the bailee, it seems the burthen

between *borrowing* and *hiring*, which the Jewish lawgiver emphatically makes, by saying, "if it be an hired thing, *it came for its hire* (n)," remains established by the concurrent wisdom of nations in all ages.

If Caius, therefore, hire a horse, he is bound to ride it as moderately, and treat it as carefully, as any man of *common discretion* would ride and treat *his own* horse; and if, through his negligence, as, by leaving the door of his stable open at night, the horse be *stolen*, he must answer for it; but not if he be *robbed* of it by highwaymen, unless by his imprudence he gave occasion to the robbery, as, by travelling at unusual hours, or by taking an unusual road; if, indeed, he hire a carriage and any number of horses, and the owner send with them his postilion or coachman, Caius is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage, while he sits in it (42).

[89]

(n) Exod. xxii. 15.

of proof lies on the plaintiff. In the above case, proof that the defendant himself prescribed and did not call in a veterinary surgeon, as a man of common prudence would have done, was evidence of negligence; but, where, in an action for the negligent use of a hired horse, whereby his knees were broken, the plaintiffs only proved the horse was a good horse and not in the habit of falling, the judge held this not to be evidence of negligence, and the plaintiff was nonsuited. (*Cooper v. Barton*, 3 Camp. N. P. C. 5, n). Dr. Story, however, remarks that there seem to be some discrepancies in the authorities on this subject, and surely, after the evidence given by the plaintiff in the last-mentioned case, there was some ground of presumption to go to the jury, in the absence of any evidence on the part of the defendant to shew that the accident happened whilst he used the horse in a careful manner. (*Harris v. Packwood*, 3 Taunt. 264. *Marsh v. Horne*, 8 D. & R. 223; 5 B. & C. 322. 2 Salk. 655).

(42) If a person hires of a stable keeper, not the carriage but

Since the negligence of a servant, *acting under his master's directions, express or implied*, is the negligence of the master (43), it follows, that, if the *servant*

only the horses, and they are driven in the hirer's *own carriage* by a servant of the stable keeper, it is doubtful whether the hirer or the stable keeper is responsible. At *Nisi Prius*, in *Sammel v. Wright*, (5 Esp. N. P. C. 263), Lord Ellenborough ruled that the owner of the horses was not responsible. But in a late case, in banc, (*Laugher v. Pointer*, 8 D. & R. 556, 5 B. & C. 545), the Judges were divided, and no judgment was given. Bayley and Holroyd, Js. being of opinion that the hirer (against whom the action was brought) was alone liable, whilst Abbott, C. J., and Littledale, J., thought the owner of the horses alone liable. Upon the principle of fixing the responsibility so as most efficiently to check misfeasance, the latter opinion seems preferable.

(43) But the master is not universally liable for the mis-deeds of his servants; he is not responsible for any wilful or malicious injury done by his servant without his knowledge or consent; but only for injuries which are done by the servant in the master's service in the course of his employment. Thus, if a servant, in driving his master's coach, by his negligence runs against and injures another coach, his master is responsible for the injury to the owner of the latter coach. But, it is otherwise if the servant, wantonly and wilfully, out of the course of his duty or employment, does the injury; as, if the injury arises from his wantonly striking, not his own master's horses, but the horses of the injured party. (*M'Manus v. Cricket*, 1 East, 106. *Croft v. Alison*, 4 B. & Ald. 590. 6 T. R. 125. 8 T. R. 188). So, if the servant of a blacksmith, in shoeing a horse, negligently injures him, the master is responsible. (1 Bl. Com. 431). But, it is otherwise, if he maliciously drives a nail into the horse's foot in order to lame him. (2 Salk. 440). In cases of misfeasance by servants, both the servant and the master are responsible; but, for the mere nonfeasance of the servant, the master alone is responsible. (12 Mod. R. 488. *Cameron v. Reynolds*, Cowp. R. 403. *Renning v. Goodchild*, 3 Wils. R. 454. 5 Burr. R. 2721. 1 Vent. 238).

In respect to thefts by the servants of a hirer, generally speaking, he is not liable, unless there are some circumstances indicative of a want, on his part, of due diligence. In *Finucane v. Small*, (1 Esp.

of Caius injure or kill the horse by riding it immoderately, or, by leaving the stable-door open, suffer thieves to steal it, Caius must make the owner a compensation for his loss (*o*); and it is just the same, if he take a ready-furnished lodging, and his guests or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care. At Rome the law was not quite so rigid; for, Pomponius, whose opinion on this point was generally adopted, made the master liable only *when he was culpably negligent in admitting careless guests or servants*, whose bad qualities he ought to have known (*p*): but this distinction must have been perplexing enough in practice; and the rule, which, by making the head of a family answerable indiscriminately for the faults of those whom he receives or employs, compels him to keep a vigilant eye on all his domestics, is not only more simple, but more conducive to the public security, although it may be rather harsh in some particular instances (*q*). It may here be observed, that this is the only contract to which the French, from whom our word *bailment* was borrowed, apply a word of the same origin; for, the letting of a house or chamber for hire is by them called *bail a loyer*,

[90]

(*o*) Salk. 282. Ld. Raym. 916.

(*p*) D. 19. 2. 11.

(*q*) Poth. Louage, n. 193.

N. P. C. 314), where a trunk was deposited with an upholsterer to be kept for a reward, and the contents were stolen by his servants, notwithstanding reasonable care in the custody of it by him, he was held not responsible for the loss. But, if he had used greater precaution in respect to like property of his own, he would have been liable for the loss. Thus, if a watch is deposited with a watchmaker for repairs, and it is left in his shop in a less secure repository than that in which he keeps his own, and it is stolen by his servants, he will be responsible for the loss. (*Clarke v. Earnshaw*, 1 Gow, N. P. C. 30).

and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb, *bailier*, to deliver; and, though the contracts which are the subject of this essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as, an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that *every prudent person* would use, if the orchard, garden, or farm, were his own.

Hiring of
work.

2. *Locatio operis*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life; but the principles by which the obligations of the contracting parties may be ascertained, are no less obvious and rational than the objects of the contract are often vast and important (*r*), (44).

(*r*) It may be useful to mention a nicety of the Latin language in the application of the verbs *locare* and *conducere*: the employer who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in Pand. par. 3, s. 320. So, in Horace,

"Tu secunda marmora

"*Locas*"—

which the stonehewer or mason *conduxit*.

(44) In the case of bailees of this description, the general obligation to restore the thing bailed (see ante, p. 1) requires some qualification. For, every bailee of work has a lien on the thing for the amount of his hire or compensation; and therefore is not, unless he specially agrees otherwise, bound to restore the thing bailed, until that compensation is paid. Thus, a tailor who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer, until he is paid for his services; nor a ship carpenter the ship which he has repaired; nor a jeweller the gem which he has set, or the seal which he has engraved; nor an agister

If Titius deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their several undertakings in a workmanly manner (*s*), but *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them: and thus, if a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, or to an hostler to be dressed and fed in his stable, the bailees are answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of themselves or their servants (45). It has, indeed, been adjudged, that, if the horse of a guest be sent to *pasture*

(*s*) 1 Ventr. 268, erroneously printed 1 Vern. 268, in all the editions of Bl. Com. ii. 452. The innumerable multitude of inaccurate or idle references in our best reports and law-tracts, is the bane of the student and of the practiser.

the horse he has taken on hire; until their compensations are respectively paid. (2 Roll. Abr. 92, M. 1. *Blake v. Nicholson*, 3 M. & S. 167. *Chase v. Westmore*, 5 M. & S. 180. *Ex parte Deese*, 1 Atk. 223. *Kirkman v. Shawcross*, 6 T. R. 14. *Rushforth v. Hadfield*, 6 East, R. 519; 7 East, R. 224).

(45) So, too, a watchmaker, having a watch left with him for repairs, is obliged to use ordinary diligence in keeping it; and, if he uses less, and the watch is lost, he is liable for the value in damages. (*Clarke v. Earnshaw*, 1 Gow, N. P. C. 30). And a workman is not only bound to guard the thing bailed against ordinary hazard, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. (*Leck v. Maester*, 1 Camp. N. P. C. 138). Agisters of cattle are within the same rule; and it is ordinary negligence for them to leave open the gates of their field, so that the cattle stray and are stolen. (*Broadwater v. Bolt, Holt*, N. P. C. 541).

Law concern-
ing innholders.

by *the owner's desire*, the innholder is not, *as such*, responsible for the loss of him by *theft* or accident (*t*); and in the case of Mosley and Fosset, an action against an agister for keeping a horse *so negligently that it was stolen*, is said to have been held maintainable *only* by reason of a *special* assumption (*u*); but the case is differently reported by Rolle, who mentions no such reason; and, according to him, Chief Justice Popham advanced generally, in conformity to the principles before established, that, "if a man, to whom horses are bailed for agistment, *leave open the gates of his field*, in consequence of which neglect they stray and are *stolen*, the owner has an action against him:" it is the same if the innkeeper send his guest's horse to a meadow *of his own accord*; for he is bound to keep safely all such things as his guests deposit *within his inn* (46), and shall not discharge himself by his own act from that obligation; and even when he turns out the horse *by order of the owner*, and receives pay for his grass and care, he is chargeable, surely, for *ordinary* negligence, as a *bailee for hire*, though not *as an innkeeper*, by the general custom of the realm. It may be worth while to investigate the reasons of this *general custom*, which, in truth, means no more than *common law* concerning innholders (*w*).

[93] Although a stipend or reward in *money* be the essence of the contract called *locatio*, yet the same responsibility for neglect is justly demanded in any of the *innominate* contracts, or whenever a valuable consideration of any kind is given or stipulated. This is the case

(*t*) 8 Rep. 32. Calye's case.

(*u*) Mo. 543. 1 Ro. Abr. 4.

(*w*) Reg. Orig. 105. a. Noy, Max. ch. 43.

(46) See post, p. 95, n. 47.

where the contract *do ut des* is formed by a *reciprocal bailment for use*; as, if Robert permit Henry to use his *pleasure-boat* for a day, *in consideration* that Henry will give him the use of his *chariot* for the same time; and so in ten thousand instances that might be imagined of *double bailments*: this, too, is the case if the *absolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as, if Charles give George a brace of pointers for the use of his *hunter* during the season. The same rule is applicable to the contract *facio ut facias*, where two persons agree to perform *reciprocal works*; as, if a mason and a carpenter have each *respectively* undertaken to build an edifice, and they mutually agree, that the first shall finish all the masonry, and the second all the wood-work, in their respective buildings; but, if a goldsmith make a bargain with an architect to give him a quantity of wrought plate for building his house, this is the contract *do ut facias*, or *facio ut des*; and, in all these cases, the bailees must answer for the omission of *ordinary* diligence in preserving the things with which they are intrusted: so, when Jacob undertook the care of Laban's flocks and herds for no less a reward than his younger daughter, whom he loved so passionately, *that seven years were in his eyes like a few days*, he was bound to be just as vigilant as if he had been paid in shekels of silver.

[94]

Now, the obligation is precisely the same, as we have already hinted (*x*), when a man takes upon himself the custody of goods *in consequence and consideration of another gainful contract*; and, though an innholder be not paid in *money* for securing the traveller's trunk, yet

(x) Pages 49, 50.

the guest facit ut faciat, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be considered as *accessary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light Gaius, and, as great a man as he, Lord Holt, seem to view the obligation; for, they agree, "that, although a bargeman and a master of a ship receive their fare for the passage of travellers, and an innkeeper his pay for the accommodation and entertainment of them, but have no pecuniary reward for the *mere custody* of the goods belonging to the passengers or guests, yet they are obliged to take *ordinary* care of those goods; as a fuller and a mender are paid for their *skill only*, yet are answerable, *ex locato*, for *ordinary neglect*, if the clothes be lost or damaged (y)."

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee than the care which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it* by *any person whatever* (z), (47); nor shall he discharge himself

(y) D. 4. 9. 5. and 12 Mod. 487.

(z) Year B. 10 Hen. VII. 26. 2 Cro. 189.

(47) 1. *Who are deemed innkeepers.*—An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. (Bac. Abr. Inns and Innkeepers, C). It must be a common inn, or *diversorium*, that is, an inn kept for travellers generally, and not merely for a short season of the year, and

from this responsibility by a refusal to take any care of the goods *because there are suspected persons in the*

for select persons, who are lodgers. (Calve's case, 8 Rep. 32. Carth. 417. 5 Mod. R. 427. 1 Salk. 387. Bac. Abr. Inn, B). But it is not necessary that the party should put up a sign as keeper of an inn. It is sufficient, if, in fact, he keeps one. (Bac. Abr. Inn, B). In a recent case, it was said, that "the true definition of an inn is, a house where the traveller is furnished with every thing which he has occasion for whilst on his way." (Thompson v. Lacy, 3 B. & Ald. 283). And, where a house of entertainment was kept in London, in which the keeper provided lodgings and entertainment for travellers and others, it was held to be an inn, although it had no stables, and no stage-coaches or waggons stopped there. (Id.). In that case the house was called the Globe Tavern and Coffee House, and was situate in Fore-street, Moorgate. Abbott, C. J., said—"The defendant in this case keeps a house where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but such as are capable of paying a compensation suitable to the accommodation provided. Now, it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country in the way of travellers. We should otherwise be obliged to say that a person who arrives at a house of public entertainment in a post chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveller, and that the landlord who gave him the accommodation required, would be an innkeeper; and yet, that, if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice inquiry in each particular case. It seems to me, therefore, that it would be better, both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns. By so deciding, the guest will have the protection of the law for the security of his goods, if they are lost or stolen, and the person who keeps the house will also have the benefit of

house for whose conduct he cannot be answerable (a): it is otherwise, indeed, if he refuse admission to a travel-

(a) Mo. 78.

the law, which allows him to retain the goods of his guest to insure the payment of his demand."

Bayley, J., said—"This is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now, this house was used for the purpose of giving accommodation to travellers, who, in London, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee, as the keeper of a coffee-house does, nor a table, as the keeper of a tavern does; but he provided lodgings, and that in the way they are provided at inns, for the charge was so much per night. In the *Six Carpenters'* case, a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with every thing which he has occasion for whilst he is on his way. It has been said, however, that in London the character of an inn belongs only to those houses of public entertainment frequented by waggons and stage-coaches. Now, if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a post chaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged, that, to constitute an inn, there should be stables annexed to it: if that were so, many inferior houses of entertainment in the country, frequented by foot travellers, would not come within the description; and the poor traveller would not have the protection which the law gives to a guest against an innkeeper. I think, therefore, that, in point of law, this is an inn, and that the defendant is under the obligations to which innkeepers are liable, viz. that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guest for the payment of his bill."

But the keeper of a mere coffee-house is not deemed an inn-

ler because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent (*b*).

(*b*) Dy. 158. b. 1 And. 29.

keeper. (*Doe v. Laming*, 4 Camp. 77). And a person who keeps a mere private boarding-house is in no just sense an innkeeper. (*Story*, *Id.* *Ibid*).

2. *Of the rights and duties of innkeepers.*—An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he has the accommodation, for a reasonable compensation; and if, upon false pretences, he refuses, he is liable to an action; and he must guard the goods of his guests with proper diligence. (1 Roll. Abr. 3 F. Bac. Abr. Inn & Innkeeper, C. *Thompson v. Lacy*, 3 B. & Ald. 283). But he is not bound by law to furnish his guests with rooms to shew their goods, but only with convenient lodging rooms and lodging. (*Burgess v. Clements*, 4 M. & S. 306, S. C. 1 Stark. N. P. C. 251, n). And the law invests him with some peculiar privileges; for, he has a lien upon the goods, and also, as it should seem, upon the person of his guest, for his compensation. (*Thompson v. Lacy*, 3 B. & Ald. 283. *Jones v. Thurloe*, 8 Mod. 172. *Newton v. Trigg*, 1 Show. 270. Bac. Abr. Inns, D). But the horse of a guest can be detained only for his own meal, and not for the meal and expenses of the guest. (Bac. Abr. Inns, D).

3. *Who are to be deemed guests.*—As inns are instituted for passengers and wayfaring men, a neighbour or friend, who is no traveller, but comes to the inn at the request of the innkeeper, and lodges there, is not deemed a guest. But, where a traveller comes to the inn, and is accepted, he becomes instantly a guest. (*Calye's case*, 8 Rep. 32. Bac. Abr. Inns, C. 5). And it was held by three Judges against Lord Holt, that, if a traveller leaves his horse at an inn, and lodges elsewhere, he is to be deemed a guest. But not if he leaves goods for which the innkeeper receives no compensation. (*York v. Grindstone*, 1 Salk. 388. 2 Ld. Raym. 860). And where a person came to an inn with a hamper of hats, and went away, and left them there for two days, and in his absence they were stolen, it was held that he was not to be deemed a guest. (*Jelly v. Clarke*, Cro. Jac. 188. Bac. Abr. Inns, C. 5). The length of time that a

Add to this, that, if he fail to provide honest *servants* and honest *innmates*, according to the confidence reposed in him by the public, his negligence in that respect is

man is at an inn makes no difference; whether he stays a week, or a month, or longer; so always, that, though not strictly *transiens*, he retains his character as a traveller. (Bac. Abr. Inns, C. 5). But, if a person comes upon a special contract to board and sojourn at an inn, he is not in the sense of the law a guest, but a boarder. (Id. Ibid).

4. *As to the liability of innkeepers.*—Innkeepers are liable only for the goods which are brought *within* the inn (*infra hospitium*). If, therefore, an innkeeper, at the request of his guest, sends the horse of his guest to pasture, and the horse is stolen, the innkeeper is not, as such, liable for the loss. (Calye's case, 8 Rep. 32). But, if he sends it of his own accord, he is liable. (Id. Ibid). However, it has been said that this rule requires some qualifications; as, if, in a country town, it is common to leave chaises and carriages under open sheds all night at inns, it would deserve consideration how far, in the case of loss, the innkeeper would be liable, and whether the traveller might not be presumed to consent to the custom.

A delivery of the goods into the custody of the innkeeper is not necessary to charge him with them. For, although the guest does not deliver them, or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen or carried away, even though the person who stole them or carried them away is unknown. Nor is it any excuse for the innkeeper that he delivered to the guest the key of the chamber in which he is lodged, and that the guest left the chamber door open. (Calye's case, 8 Rep. 32). But, if the innkeeper requires of his guest that he should put his goods into a particular chamber under lock and key, and that then he will warrant their safety, otherwise not, and the guest, notwithstanding (Id. Ibid), leaves them in an outer court, where they are taken away, the innkeeper will be discharged. (Id. Ibid). And, although an innkeeper refuses to take charge of goods for a party until another day, yet, if he admits him as a guest into his inn for temporary refreshments, and the goods are stolen while he is there, the innkeeper will be responsible for the loss. (Bennett v. Mellor, 5 T. R. 273. If, indeed, the innkeeper had received the goods, and the party had gone away, and afterwards the loss had occurred, the innkeeper would

highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests who sleep in his chambers (c). Rigorous as this law may seem, and hard

(c) 1 BL. Comm. 430.

have been liable only as a bailee or depositary, and, if he had refused to receive the party as a guest, he would not have been liable at all. (Id. Ibid).*

It has been decided in the American courts, that, if the goods are delivered at the usual place for such goods at the inn, the innkeeper

* In this case, the plaintiff's servant called at the defendant's inn, and asked the defendant's wife if he could leave his goods there till the next market day: the wife replied, she could not tell, for they were very full of parcels. The servant then sat down in the inn, had some liquor, and put the goods on the floor behind him, but when he got up they were missing. Upon these facts, a verdict was given for the plaintiff; and, upon a motion for a new trial, (which was not granted), Buller, J. said—"Although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited, (viz. Dyer, 158. b), where the innkeeper said his house was full, and refused to take in the guest: that, if true, is a good excuse; and, if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week: if the defendant had taken the goods upon that request, he could only be liable as a bailee; but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn that is sufficient to charge him. In Calye's case it is said—'Although the guest doth not deliver his goods to the innkeeper to keep, nor acquaints him with them, yet, if they be carried away or stolen, the innkeeper shall be charged; and therewith agrees 42 Ed. 3, 11, a.' There it is said, that, on the words of the writ the innkeeper is answerable for every thing in his inn, but not for a horse which the owner orders to be put out to pasture. One of the passages cited from Com. Dig. cannot be supported if taken in a general sense; for all the authorities agree that it is not necessary to prove negligence in the innkeeper."

as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to

is chargeable with them, although not strictly within the inn; as, if wheat in a sleigh is put into the outer house appurtenant to the inn, and used for such purposes, and afterwards is stolen, the innkeeper is liable for the loss. (Story, 314, citing *Chute v. Wiggins*, 14 Johns. R. 175).

Although the general language of the writ in the register against an innkeeper is, that the innkeeper is liable for the goods and chattels of the guest, which would seem not to extend to deeds, obligations, and choses in action, yet the latter are held moveables within the custom to bind the innkeeper. (Calye's case, 8 Rep. 32). But the innkeeper is liable only for the safe custody of the property of his guest, and not for any tort or injury done by his servants or others to the person of the guest, without his own co-operation or consent. (*Id. Ibid.*).

5. *What circumstances will exonerate the innkeeper.*—By the common law, as laid down in Calye's case, (8 Rep. 32), an innkeeper is not chargeable unless there is some default in him, or in his servants, in the well and safe keeping and custody of his guest's goods and chattels within his common inn; but he is bound to keep them safe without any stealing or purloining. But this doctrine is to be understood with this qualification, that the loss will be deemed *prima facie* evidence of negligence; and that the innkeeper cannot exonerate himself but by positive proof that the loss was not by means of any person for whom he is responsible. (*Bennett v. Mellor*, 5 T. R. 273. *Burgess v. Clements*, 4 M. & S. 306). The innkeeper, however, may be exonerated in divers other ways; as, for example, by showing that his guest has taken upon himself exclusively the custody of his own goods, or has, by his own neglect, exposed them to the peril. (Calye's case, 8 Rep. 32). Thus, where a traveller had some boxes of jewelry, and desired a room to himself for the purpose of opening and shewing it to customers; and he had a room assigned to him, and the key delivered to him, with directions about locking the door; and he used the room accordingly, and unpacked his jewelry; and he afterwards went away, and left the room for some hours, leaving the key in the lock on the outside of the door,

which all private considerations ought to yield; for, travellers, who must be numerous in a rich and commercial

and some of the boxes of jewelry were stolen; it was held, that the innkeeper was not liable*. So, where a guest at an inn depo-

* *Burgess v. Clements*, 4 M. & S. 306, S. C. 1 Stark. N. P. C. 251 n. In this case the Judge at Nisi Prius left it to the jury to determine whether, under the circumstances above stated, the plaintiff had not discharged the innkeeper (the defendant).—Upon a motion for a new trial, Lord Ellenborough, C. J. said—“I cannot see anything to impeach the propriety of this verdict. Perhaps the facts of the case might have been commented on more at large, and most probably the learned Judge did comment on them at the trial to a larger extent, and more completely using his own province, and less devolving it on the jury, than appears by a limited statement of a report. But the question here is, whether the jury, in finding this verdict, have not rightly exercised their province. Now, the law obliges an innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely, so that in the language of the writ, *pro defectu hospitatoris hospitalitibus damnum non eveniat ullo modo*. And I do not say, that, if the goods be stolen from the inn, it is not *primâ facie* to be taken as happening through the fault of the innkeeper. But, there can be no doubt also that there may be some circumstances, as, if the guest by his own neglect induces the loss, or introduces himself the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*; and, under such circumstances, the plaintiff shall not complain of the loss. Now, let us first consider whether the plaintiff came to this inn *causâ hospitandi*; and 2ndly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping room; but we may, I think, presume he had, apart from the travellers' room; but he desires to have a private room up some steps, in order to shew his goods. Now, an innkeeper is not bound by law to find shew rooms for his guests, but only convenient lodging rooms and lodging. As to what is laid down in *Calye's case*, respecting the delivery of the key to the guest, it plainly relates to the chamber door in which he is lodged. And I agree, that, if an innkeeper

country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are

sits his goods in a room, and makes use of it as a warehouse for them, having the exclusive possession of it, he is understood to take

gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But, if there be evidence that the guest accepted the key, and took upon himself the care of his goods, surely it is for the jury to determine whether the evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room. The cases shew that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his own fault; as, if the goods are carried away by the guest's servant, or companion, whom he brings with him. For, thus it is laid down in Calye's case, 'that, if the servant of the guest, or he who comes with him, or he whom he desires to be lodged with him, steal or carry away the goods, the innkeeper shall not be charged; for, there the fault is in the guest to have such companion or servant;' which shews, that, for such damage as is occasioned by the misconduct of the guest, he shall not be entitled to complain or to have any recompense. Now, what is the conduct of the plaintiff in this case? The innkeeper not being bound to find him any more than lodging and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and of introducing a number of persons, over whom the innkeeper can have no check or controul; and this, as it seems to me, for a purpose wholly alien from the ordinary purpose of an inn which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as an innkeeper. Besides, after the circumstance relating to the stranger took place, which might well have awakened the plaintiff's suspicions, it became his duty, in whatever room he might be, to use at least ordinary diligence, and particularly so, as he was occupying a chamber for a special purpose. For, in general, though a traveller,

usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers,

upon himself the exclusive charge of his own goods. (*Furnworth v. Packwood*, 1 Stark. R. 249). Upon the same principles, if a guest at an inn, instead of confiding his goods to the innkeeper, commits them exclusively to the custody of another person who is living at the inn, the innkeeper is not chargeable for them. (*Story*, 315, citing an American decision, *Sneider v. Geiss*, 1 Yeates, R. 34).

But the mere exercise of a choice by the guest, not objected to, though for his own convenience, if he does not acquire an exclusive possession thereby, will not discharge the innkeeper from his general responsibility. Thus, if the habit of the servants at an inn is, to place the guests' goods in their bed-rooms, and a guest should re-request his to be carried into the common commercial room to which travellers in general resort, and they are there stolen, the innkeeper will nevertheless be held responsible for the loss, unless he has given notice to the guest that he will not be responsible if the goods are not put into the bed-room. (*Richmond v. Smith*, 2 Man. & R. 235. 8 B. & C. 9).

It may be added, that innkeepers are responsible for the loss of goods only when they have been received by them in that character. If they have become bailees generally, they are then liable only according to the nature of the particular bailment or contract. (*Hyde v. Mersey and Trent Nav. Co.* 5 T. R. 389). If, too, an innkeeper entertains a traveller gratis, it would probably be held he did not entertain him in that character, and therefore was not liable in the same manner as if he received a compensation. (*Bac. Abr. Inns*, C. D. Calye's case, 8 Rep. 32. *Thompson v. Lacy*, 3 B. & Ald. 283).

who resorts to inn, may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care. It seems to me that this room was not merely intrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to use ordinary care for the safe keeping of his goods, and that it is owing to his neglect, and not to the fault of the innkeeper that the loss has happened, and this was a question which it was proper to leave to the jury." The other judges delivered similar opinions.

while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to Pomponius, *his desire of securing the public from the dishonesty of such men*, and by his edict gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali*, or by *inevitable accident*; and Ulpian intimates that even this severity could not restrain them from knavish practices or suspicious neglect (*d*).

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force* which occasioned the loss or damage was truly *irresistible*.

[97]

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiæ*, and might have been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care* which he *lets out* for pay are in truth a mental operation. Whatever be his appellation, either in English or Latin, he is clearly responsible, like other interested bailees, for *ordinary negligence* (48); and, although St. German seems

Remarks on St.
German.

(*d*) D. 4. 9. 1. and 3.

(48) 1. *As to warehousemen.*—The most important practical question which arises in respect to them is, to ascertain where their liability as such begins and ends; or, in other words, when their duty of custody commences and finishes. And, it has been decided,

to make no difference in this respect between a *keeper of goods for hire* and a *simple depositary*, yet he uses the

that, as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse, the liability of the warehouseman commences; and it is no defence that they are injured by falling into the street from the breaking of the tackle, even if the carman who brought them has refused the offer of slings for further security. (*Thomas v. Day*, 4 Esp. N. P. C. 262).

But suppose (which is not an uncommon case) that a person acts both as a common carrier and as a warehouseman, it sometimes becomes a matter of great nicety to decide in which character he is chargeable; for, as the responsibilities of the two characters are very different, he may in one character be liable for a loss from which he would be exempt in the other. For example, a common carrier is liable for losses by fire not occasioned by inevitable casualty; (*Forward v. Pittard*, 1 T. R. 27); whereas a warehouseman is not liable for any losses by fire, unless he has been guilty of ordinary negligence. Thus, a common carrier from Stourpoint to Manchester undertook to carry goods from the former to the latter place, and to forward them from thence to Stockport. Upon arrival at Manchester, the goods were deposited in his warehouse, to await an opportunity of sending them on to Stockport by the Stockport carrier, there being none there at that time by whom they could be sent on. Before he had an opportunity of sending them, they were destroyed by an accidental fire; and the question was, whether he was liable for the loss or not; and it was held that he was not liable, because his duty of carrier had terminated, and his duty as warehouseman had commenced, before the loss. It was not thought to make any difference in the case, that he received no distinct compensation as warehouseman. (*Garside v. Trent and Mersey Navigation Company*, 4 T. R. 581).

However, if the carrier's duty had not been completed at the time of the loss, it would have been otherwise: as, if the deposit in the warehouse, had been at some intermediate place in the course of his own route, or if after the arrival at the place of destination, he was still bound to deliver the goods to the owner; and before such delivery he had put them, for his own convenience, into his own warehouse, where they were consumed by fire. In these, and other like cases, his

word *default*, like the *culpa* of the Romans, as a general term, and leaves the *degree* of it to be ascertained by the rules of law (e).

(e) Doct. and Stud. where before cited.

proper duty as carrier not being ended, he is still considered as acting in his character of carrier, although he makes a distinct charge for warehouse room, and also for cartage of the goods after their arrival at the place of destination from the warehouse to the owner's house.

But, where the goods have arrived at their place of destination, and are there deposited in the carrier's warehouse, to await the owner's convenience of sending for them; there the duty as carrier ends on the arrival of the goods at the warehouse, and the duty as warehouseman commences.

And where a person is at the same time a wharfinger, warehouseman, forwarding merchant, and carrier, and receives goods into his warehouse to be forwarded, the warehouse being on his wharf, and the goods are not yet put upon their transportation, he is liable only in his character of warehouseman, for his duty as such has not ceased. (*Roskell v. Waterhouse*, 2 Stark. N. P. C. 461).

2. *As to wharfingers.*—Upon principle, their case is not distinguishable from that of other depositaries for hire; and, therefore, they are responsible only for ordinary diligence. (*Jones, supra*). An attempt, however, has been made to extend their liability to that of common carriers, founded upon some general expressions of Lord Mansfield and Lord Ellenborough, which, however, upon close examination, will be found not to justify the conclusion. Lord Mansfield, in *Ross v. Johnson*, (5 Burr. 2827), said, "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive goods on a contract. Every case against a carrier is like the same case against a wharfinger." Now, it is most material to consider, that the sole point before the court was, whether trover would lie against a carrier, when the goods had been lost or stolen by his negligence, and not converted by him; and a case was cited of a wharfinger, in which it was held, that case, and not trover, under such circumstances, was the proper action. And, in this view, Lord Mansfield's language was most accurate and appropriate; for,

In a sentence immediately following, he makes a very material distinction between the two contracts; for, "if

there could, in such a case, be no difference between a wharfinger and a carrier, as to the form of the action. In *Maving v. Todd* (1 Stark. R. 72), which was an action against the defendants, who were wharfingers and lightermen, for not safely keeping a quantity of goods intrusted to them in London, to be shipped to the vendees of the plaintiff at Newcastle, it appeared that the goods had been accidentally destroyed by fire, while on the defendant's premises; and the question was, whether the defendants, whose duty it was to convey the goods from the wharf in their own lighter to the vessel in the river, were liable for the loss. Lord Ellenborough is reported to have said, that "the liability of a wharfinger, while he has possession of the goods, was similar to that of a carrier." Now, it does not appear at what time the goods were destroyed by fire; whether, when they were in the warehouse, or on the wharf of the defendants, or in their progress to be put on board of the lighter. If the goods were on the wharf in their transit to go on board of the lighter, the remark of Lord Ellenborough, though not accurate in expression, would, in substance, have been justifiable in the particular case, for, his duty as lighterman would then have commenced. But, if his Lordship meant to say (according to the dictum in *Starkie*) that the liability of a wharfinger and carrier were universally the same, he was certainly incorrect. Indeed, the case is perfectly explicable on another ground, and that is, that the goods were in the hands of the defendants as lightermen (who are deemed common carriers) for carriage, and not as mere wharfingers. And the only point worthy of consideration is, whether, as the defendants united both characters, they were in point of fact acting in one character or the other at the time of the loss by fire. In another report of the same case, (4 Camp. N. P. C. 225), the action is said to have been brought against the defendants as wharfingers, and the goods were burnt while on the wharf, before any opportunity of shipping them. But, in this report, no notice is taken of the above dictum of Lord Ellenborough, which may, therefore, justly raise a doubt as to the accuracy of the other report.

The case of a wharfinger is in no respect distinguishable from that of a warehouseman, and it has, in fact, not been distinguished in

a man," says he, "have a *certain recompence* for the keeping of goods, and promise at the time of the delivery to *redeliver them safe at his peril*, then he shall be charged with *all chances* that may befall; but, if he make *that* promise, and *have nothing* for keeping them, he is bound to *no casualties* but such as are wilful, and happen *by his own default*:" now, the word *peril*, like *periculum*, from which it is derived, is in itself ambig-

any solemn adjudication. (*Sideways v. Todd*, 2 Stark. N. P. C. 400). On the other hand, the case of a carrier has always been treated as an excepted case, turning on peculiar principles of public policy. In fact, the case before Lord Ellenborough was decided on another point in favour of the defendants; that of a special contract excluding losses by fire; and therefore never called for any revision: and, if it is to be understood as containing any general proposition, not qualified by the particular circumstances of the case, it is opposed by better and well considered opinions. (*Garside v. Trent Nav. Co.* 4 T. R. 581. *Hyde v. The Same*, 5 T. R. 389. In re *Webb*, 2 J. B. Moore, 500. 8 Taunt. R. 443. 2 J. B. Moore, 500).

At what time the responsibility of a wharfinger begins and ends, depends upon the question when he acquires and when he ceases to have the custody of the goods in that capacity. This is generally governed by the usages of the business. Where goods are in the wharfinger's possession to be sent on board a vessel for a voyage, as soon as he delivers the possession and care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usages of trade, deemed exonerated from any further responsibility; and the goods are deemed in the constructive possession of the officers of the ship. (*Cobban v. Downe*, 5 Esp. N. P. C. 41). A mere delivery of goods at a wharf is not necessarily a delivery of them to the wharfinger; and there must be some act or assent on his part to the custody, before he becomes the custodee. (*Buckman v. Levi*, 3 Camp. N. P. C. 414. *Gibson v. Inglis*, 4 Camp. N. P. C. 72).

In respect to depositaries for hire, the onus probandi of negligence lies on the plaintiff, in a suit brought for the loss. (*Finucane v. Small*, 1 Esp. N. P. C. 316. *Harris v. Packwood*, 3 Taunt. R. 267. *Marsh v. Horne*, 5 B. & C. 322, 327).

ous, and sometimes denotes the *risk* of *inevitable mischance*, sometimes the *danger* arising from a *want of due circumspection*; and the *stronger sense* of the word *was taken* in the first case *against him who uttered it*; but, in the second, where the construction is favourable, the *milder sense* was justly preferred (*f*). Thus, when a person, who, if he were wholly *uninterested*, would be a *mandatary*, undertakes for a *reward* to perform *any work*, he must be considered as bound still more strongly to use a *degree of diligence adequate to the performance of it*: his obligation must be rigorously construed, and he would, perhaps, be answerable for *slight* neglect, where no more could be required of a *mandatary* than *ordinary exertions*. This is the case of commissioners, factors, and bailiffs (49), when their undertaking *lies in fescance*, and not simply in *custody*; hence, as peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the shaft of the capital, Gaius seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation (*g*). Lord Coke considers a factor in the light of a *servant*, and thence deduces his obliga-

Law concerning factors and traders.

(*f*) See before, p. 45.

(*g*) D. 19. 2. 7.

(49) This opinion is inconsistent with the general principles of this class of bailments. In bailments of mutual benefit, the bailee is liable only for ordinary, and not for slight neglect; for ordinary neglect of skill, and not for slight. The workman for hire undertakes for the ordinary diligence of a workman in his particular business; and the very case put of commissioners (commission merchants), factors, and bailiffs, when their undertaking lies in fescance, shews the mistake; for, it is clear, that only ordinary diligence and skill can be demanded of them. (*Russell v. Palmer*, 2 Wils. R. 325. *Denew v. Daverell*, 3 Camp. N. P. C. 451. *Sheills v. Blackburne*, 1 H. Bl. 159. *Seare v. Prentice*, 8 East R. 348).

[99]

tion; but, with great submission, his *reward* is the true reason, and *the nature of the business* is the just measure, of his duty (*h*); which cannot, however, extend to a responsibility for *mere accident* or *open robbery* (*i*); and even in the case of *theft*, a factor has been holden excused when he showed "that he had *laid up* the goods of his principal in a warehouse, out of which they were *stolen* by certain malefactors to him unknown (*k*)."

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for *a due application of the necessary art*: it is his own fault if he undertake a work above his strength; and all that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi* (*l*). I conceive, however, that, where the bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability (*m*). The case which Sadi relates with elegance and humour in his *Gulistan*, or *Rose-garden*, and which Puffendorf cites with approbation (*n*), is not inapplicable to the present subject, and may serve as a specimen of Mahomedan *law*, which is not so different from ours as we are taught to imagine: 'A man who had a disorder in his eyes, called on a *farrier* for a remedy; and he applied to them a medicine commonly used for *his* patients: the man lost his sight, and brought

[100]

Mahomedan
law.

(*h*) 4 Rep. 84. Ld. Raym. 918.

(*i*) 1 Inst. 89. a.

(*k*) 1 Vent. 121. Vere and Smith.

(*l*) Spondet, say the Roman lawyers, peritiam artis.

(*m*) Page 54. (*n*) De Jure Nat. et Gent. lib. 5, c. 5, s. 3.

an action for damages;' but the judge said, "No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier*;" and Sadi proceeds to intimate, that, "if a person will employ a common *mat-maker* to weave or embroider a *fine carpet*, he must impute the bad workmanship to his own folly (o)."

In regard to the distinction before-mentioned between the *non-fesance* and the *mis-fesance* of a workman (p), it is *indisputably* clear, that an action lies in *both* cases for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expressly* stipulated, or, in the case of a *common* trader, strongly *implied*; of which Blackstone gives the following instance: "If a *builder* promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay (q)." The learned author meant, I presume, a *common* builder, or supposed a *consideration* to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the *non-performance* of a *mandatary* (r).

[101]

Before we leave this article, it seems proper to remark, that every bailee for *pay*, whether conductor rei or conductor operis, must be supposed to know that the goods and chattels of his bailor are in *many* cases *dis-*

Rules and distinctions.

(o) Rosar. Polit. c. 7. There are numberless tracts in Arabic, Persian, and Turkish, on every branch of jurisprudence; from the best of which it would not be difficult to extract a complete system, and to compare it with our own; nor would it be less easy to explain in Persian or Arabic such parts of our English law, as either coincide with that of the Asiatics, or are manifestly preferable to it.

(p) Pages 54, &c.

(q) 3 Comm. 157.

(r) Pages 56, 57, 61.

[102]

trainable for rent, if the landlord, who might otherwise be shamefully defrauded, find them on the premises (*s*); and, as they cannot be distrained and sold without his *ordinary* default *at least*, the owner has a remedy over against him, and must receive a compensation for his loss (*t*): even if a *depository* were to remove or conceal *his own* goods, and those of his depositor were to be seized for rent-arrere, he would unquestionably be bound to make restitution; but there is no obligation in the bailee to *suggest wise precautions against inevitable accident*; and he cannot, therefore, be obliged to *advise insurance from fire*; much less to *insure* the things bailed without an authority from the bailor.

Celebrated law
of Alfenus.

It may be right also to mention, that the distinction before taken in regard to *loans* (*u*), between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case, it is a regular *bailment*; in the second, it becomes a *debt*. Thus, according to Alfenus, in his famous law, on which the judicious Bynkershoek has learnedly commented, “if an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape (*w*):” the smith may consequently apply it to his own use: but, if it perish even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner,

(*s*) Burr. 1498, &c.

(*t*) 3 BL. Comm. 8.

(*u*) Pages 64, 65. (w) D. 19. 2. 31. Bynk. Obs. Jur. Rom, lib. VIII.

were agreed to be *specifically* redelivered in the form of a cup or a standish.

3. *Locatio operis mercium vehendarum* is a contract which admits of many varieties in *form*, but of none, as it seems *at length* to be settled, in the *substantial* obligations of the bailee (50). Hiring of carriage.

A *carrier for hire* ought, by the rule, to be responsible only for *ordinary* neglect; and, in the time of Henry VIII., it appears to have been generally holden; "that a *common* carrier was chargeable, in case of a loss by *robbery*, only when he had travelled by *ways dangerous for robbing*, or driven by *night*, or at any *inconvenient hour* (x):" but, in the commercial reign of Elizabeth, it was resolved, upon the same broad principles of policy and convenience that have been mentioned in the case of *innholders*, "that, if a *common carrier* be *robbed* of the goods delivered to him, he shall answer for the value of them (y)."

Now, the *reward* or *hire*, which is considered by Sir Edward Coke as the reason of this decision, and on which the principal stress is often laid in our own times, makes the carrier liable, indeed, for the omission of *ordinary* care, but cannot extend to *irresistible force*; and, though some other bailees have a *recompence*, as, *factors*

(x) Doct. and Stud. where often before cited.

(y) 1 Inst. 89. a. Mo. 462. 1 Ro. Abr. 2, Woodlief and Curties.

(50) For a complete statement of the law relating to carriage for hire, see Appendix, article Common Carriers. From the length and unity of the supplementary matter on the law of carriers (the whole of which, except as far as the English law differs from the American, I have derived from the valuable Commentaries of Dr. Story), I have preferred placing it in the Appendix, as a separate essay: it will well repay a careful and frequent perusal.

and *workmen for pay*, yet, even in Woodlief's case, the Chief Justice admitted that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier*: the true ground of that resolution is the *public employment* exercised by the carrier, and the danger of his combining with *robbers*, to the infinite injury of commerce and extreme inconvenience of society (z).

Exceptions
from the
general rule.

The modern rule concerning a *common carrier* is, that nothing will excuse him, except *the act of God*, or of "*the king's enemies* (a), (51);" but a momentary attention to the principles must convince us that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it: a carrier is *regularly* answerable for neglect, but not *regularly* for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable *misfortune*; but the great maxims of policy and good government make it necessary to *except* from this rule the case of *robbery*, lest confederacies should be formed between carriers and desperate villains, with little or no chance of detection (52).

Although the *act of God*, which the antients, too, called *Dei clav* and *vim divinam*, be an expression which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as

(z) *Ld. Raym.* 907. 12 *Mod.* 487. (a) *Law of Nisi Prius*, 70, 71.

(51) Besides these common law exceptions, there are statutory limitations on the responsibility of carriers, which are stated in the Appendix. See art. Common Carriers.

(52) For an exposition of the principles of the carrier's responsibility, see *Riley v. Horne*, 2 *Moore & Payne*, 333, 5 *Bing.* 217—the judgment of Best, C. J.

more decent, to substitute in its place *inevitable accident*: religion and reason, which can never be at variance without certain injury to one of them, assure us that “not a gust of wind blows, nor a flash of lightning gleams, without the knowledge and guidance of a superintending mind;” but this doctrine loses its dignity and sublimity by a technical application of it, which may in some instances border even upon profaneness; and law, which is merely a practical science, cannot use terms too popular and perspicuous.

In a recent case of an action against a carrier, it was holden to be no excuse, “that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed (*b*);” but the true reason of this decision is not mentioned by the reporter; it was, in fact, at *least ordinary* negligence, to let a rat do such mischief in the vessel (53); and the Roman law has, on this principle, decided, that “*si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere* (*c*).”

Whatever doubt there may be among civilians and common lawyers in regard to a *casket the contents of which are concealed from the depositary* (*d*), it seems

(*b*) 1 Wils. part 1, 281. Dale and Hall.

(*c*) D. 19. 2. 13. 6.

(*d*) Before, pp. 37, 38, 39.

(53) But, if the master had used all reasonable precautions to prevent such a loss, as by having a cat on board, by the general consent of the writers upon the foreign maritime law, it would be held a peril of the sea, or inevitable accident. (Abbott on Shipp. p. 3, c. 3, s. 9. Roccus de Navibus, n. 56. Id. De Assecur. n. 49. 1 Emerig. Assecur. 277, 378. Marsh. Ins. B, 1, c. 7, s. 4, p. 242; but see Kent Com. 243, and n. (*c*).

Law concern-
ing masters of
vessels.

[107]

to be generally understood, that a *common carrier* is answerable for the loss of a box or parcel, be he ever so *ignorant of its contents* (54), or be those contents ever so valuable, *unless* he make a *special* acceptance (e): but *gross fraud and imposition* by the bailor will deprive him of his action; and, if there be proof that the parties were apprised of each other's intentions, although there was no personal communication, the bailee may be considered as a *special* acceptor: this was adjudged in a very modern case particularly circumstanced, in which the former cases in Ventris, Alleyne, and Carthew, are examined with liberality and wisdom; but, in all of them, too great stress is laid on the *reward*, and too little on the important motives of *public utility*, which alone distinguish a *carrier* from other *bailees for hire* (f). Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of James I., that a *common hoyman*, like a common *waggoner*, is responsible for goods committed to his custody, even if he be *robbed* of them (g); but the reason said to have been given for this judgment, namely, because *he had his hire*, is not the true one; since, as we have before suggested, the *recompence* could

(e) 1 Stra. 145. Tichburn and White.

(f) Burr. 2208. Gibbon and Paynton. See 1 Vent. 238. All. 93. Carth. 485.

(g) Hob. ca. 30. 2 Cro. 330. Rich and Kneeland. "The first case of this kind," said Lord Holt, "to be found in our books." 12 Mod. 410.

(54) By a recent statute, carriers by land are relieved from their common law liability, in the cases of certain descriptions of property, unless its nature and value be declared by the bailor at the time of its delivery to the carrier. See Appendix, art. Common Carriers.

only make him liable for *temerity* and *imprudence*; as, if a bargemaster were rashly to shoot a bridge, *when the bent of the weather is tempestuous*; but not for a mere *casualty*, as, if a hoy, in good condition, shooting a bridge at a proper time, were driven against a pier by a sudden breeze, and upset by the violence of the shock (*h*); nor, by parity of reason, for any other force too great to be resisted (*i*); the *public* employment of the *hoyman*, and that *distrust* which an antient writer justly calls the *sinew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.

All that has just been advanced concerning a *land* carrier may, therefore, be applied to a *bargemaster* or *boatman*; but, in case of a tempest, it may sometimes happen that the law of *jetson* and *average* may occasion a difference. *Barcroft's case*, as it is cited by Chief Justice Rolle, has some appearance of hardship: "a box of jewels had been delivered to a ferryman, who knew not what it contained, and a sudden storm arising in the passage, he threw the box into the sea; yet it was resolved *that he should answer for it* (*k*):" now, I cannot help suspecting that there was proof in this case of *culpable negligence*, and probably the casket was both *small* and *light* enough to have been kept longer on board than other goods; for, in the case of the *Gravesend barge*, cited on the bench by Lord Coke, it appears that the pack which was thrown overboard in a tempest, and for which the bargeman was holden *not answerable*, was of great value and great weight; although this last circumstance be omitted by Rolle, who says only, that

[108]

(*h*) 1 Stra. 128. Amies and Stevens.

(*i*) Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* most learnedly discussed in Desid. Herald. Animadv. in Salmassii Observ. in Jus. Att. et Rom. cap. xv.

(*k*) All. 93.

the master of the vessel had *no information of its contents* (l), (55).

[109] The subtilty of the human mind, in finding distinctions, has no bounds; and it was imagined by some, that, whatever might be the obligation of a *barge-master*, there was no reason to be equally rigorous in regard to the master of a *ship*: who, if he carry goods for *profit*, must indubitably answer for the *ordinary neglect* of himself or his mariners, but ought not, they said, to be chargeable for the violence of *robbers*: it was, however, otherwise decided in the great case of *Mors and Slew*, where “eleven persons armed came on board the ship *in the river*, under pretence of *impressing seamen*, and forcibly took the chests which the defendant had engaged to carry;” and, though the master was entirely blameless, yet Sir Mathew Hale and his brethren, having heard both civilians and common lawyers, and, among them, Mr. Holt for the plaintiff, determined, on the principles just before established, that the bailor ought to recover (m). This case was frequently mentioned afterwards by Lord Holt, who said, that “the declaration was drawn by the greatest pleader in England of his time (n).”

Still further: since neither the *element* on which the goods are carried, nor the *magnitude* and *form* of the carriage make any difference in the responsibility of the bailee, one would hardly have conceived that a diversity could have been taken between a *letter* and any other

(l) 2 Bulstr. 280. 2 Ro. Abr. 567. (m) 1 Ventr. 190, 238. Raym. 220.

(n) Ld. Raym. 920.

(55) Dr. Story remarks, that, if the doctrine of *Barcroft's* case be, that jettison will not in a clear case of necessity discharge the carrier, it is not law.

thing. Our *common* law, indeed, was acquainted with no such diversity; and a *private* post-master was precisely in the situation of another carrier; but, the statute of Charles II. having established a *general* post-office, and taken away the liberty of sending letters by a *private* post (*o*), it was thought that an alteration was made in the obligation of the post-master *general*: and in the case of Lane and Cotton, three judges determined, against the fixed and well-supported opinion of Chief Justice Holt, "that the post-master was *not* answerable for the loss of a letter with exchequer bills in it (*p*)," (56); now, this was a case of *ordinary* neglect, for, the bills were *stolen* out of the plaintiff's letter *in the defendant's office* (*q*); and, as the master has a great *salary* for the discharge of his trust; as he ought clearly to answer for the acts of his clerks and agents; as the statute, pro-

[110]

Case of Lane and Cotton.

(*o*) 12 Cha. II. c. 35. See the subsequent statutes.

(*p*) Carth. 487. 12 Mod. 482.

(*q*) In addition to the authorities before cited, p. 44. n. (*o*), for the distinction between a loss by *stealth* and by *robbery*, see Dumoulin, tract De eo quod interest, n. 184, and Rosella casuum, 28. b. This last is the book which St. German improperly calls Summa Rosella, and by misquoting which he misled me in the passage concerning the fall of a house, p. 68. The words of the author, Trovamala, are these: "Domus tua minabatur ruinam: domus corruit, et interficit equum tibi commodatum; certe non potest dici casus fortuitus; quia diligentissimus reparasset domum, vel ibi non habitasset; si autem domus non minabatur ruinam, sed impetu tempestatis valide corruit, non est tibi imputandum."

(56) 1 Ld. Raym. 646, S. C. The same question was again discussed in *Whitfield v. Lord Le Despencer* (Cowp. 754), and the court were of the same opinion. But, although the postmaster general is not liable as a common carrier, for the negligence of his deputies or servants, they are personally liable for all losses and injuries occasioned by their own default in office. (*Renning v. Goodchild*, 3 Wils. R. 443. *Whitfield v. Lord Le Despencer*, Cowp. 754. *Stork v. Harris*, 5 Burr. 2709).

[111] fessedly enacted for *safety* as well as *dispatch*, could not have been intended to deprive the subject of any benefit which he before enjoyed; for these reasons, and for many others, I believe that Cicero would have said what he wrote on a similar occasion to Trebatius, “Ego tamen *Scævola* assentior (r).” It would, perhaps, have been different *under the statute*, if the post had been *robbed* either by day or by *night*, when there is a necessity of travelling, but even that question would have been disputable; and here I may conclude this division of my essay with observing, in the plain but emphatical language of St. German, “that all the *former* diversities be granted by secondary conclusions derived upon the law of reason, *without any statute made in that behalf*: and, peradventure, laws and the conclusions therein be the more plain and the more open; for, *if any statute were made therein*, I think verily more doubt and questions would arise *upon the statute*, than doth now, when they be only argued and judged after the *common law* (s).”

Laws of the
Northern na-
tions.

[112] Before I finish the *historical* part of my essay, in which I undertook to demonstrate “that a perfect harmony subsisted on this interesting branch of jurisprudence in the codes of nations *most eminent for legal wisdom* (t),” I cannot forbear adding a few remarks on the institutions of those nations who are generally called *barbarous*, and who seem in many instances to have deserved that epithet; although traces of sound reasoning and solid judgment appear in most of their ordinances.

By the antient laws of the Wisigoths, which are indeed rather obscure, the “keeper of a horse or an ox

(r) Epist. ad Fam. VII. 22.

(s) Doct. and Stud. dial. 2, chap. 38, last sentence.

(t) Page 11.

for hire, as well as a *hirer for use*, was obliged, if the animal *perished*, to return another of equal worth:" the law of the Baiuvarians on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of Charlemagne and Lewis the Pious (*u*), where the Mosaic law before cited concerning a *borrower* may also be found (*w*). In all these codes a *depository* of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by *fire*, and *his own* goods perish *not* with them; a circumstance which some other legislators have considered as *conclusive* evidence of gross neglect or fraud: thus, by the old British Tract, called the Book of Cynawg, a person who had been *robbed* of a deposit, was allowed to clear himself by making oath, with compurgators, that he had no concern in the robbery, *unless he had saved his own goods*: and it was the same, I believe, among the Britons in the case of a loss by *fire*, which happened without the fault of the bailee; although Howel the Good seems to have been rigorous in this case for the sake of public security (*x*). There was one regulation in the Northern code, which I have not seen in that of any other nation; if precious things were deposited and *stolen*, time was given to search for the thief, and, if he could not be found within the time limited, a *moiety* of the value was to be paid by the depository to the owner, "ut damnum ex medio uterque sustineret (*y*)."

Laws of the
Britons.

[113]

Now, I can scarce persuade myself, that the phrase used in those laws, *si id perierit*, extends to a perishing

(*u*) Lindenbrog. LL. Wisigoth. lib. 5, tit. 5, ss. 1, 2, 3, and LL. Baiuvar. tit. 14, ss. 1, 2, 3, 4. Capitul. lib. 5, s. 204.

(*w*) Capitul. lib. 6, s. 22. Exod. xxii. 14, 15.

(*x*) LL. Hywel Dda. lib. 3, c. 4, s. 22, and lib. 3, c. 3, s. 40. See also Stiernh. De Jur. Sueon. p. 256, 257.

(*y*) LL. Wisigoth. lib. 5, tit. 5, s. 3.

by *inevitable accident*: nor can I think that the old Gothic law cited by Stiernhook fully proves his assertion, that "a depositary was responsible for *irresistible force*;" but I observe that the military lawgivers of the North, who entertained very high notions of good faith and honour, were more strict than the Romans in the duties by which depositaries and other trustees were bound: an exact conformity could hardly be expected between the ordinances of polished states and those of a people who could suffer disputes concerning bailments to be decided by *combat*: for, it was the Emperor Frederick II. who abolished the trial by battle in cases of contested deposits, and substituted a more rational mode of proof (z).

[114]

Laws of the
Indians.

I purposely reserved to the last the mention of the Hindu, or Indian, code, which the learning and industry of my much-esteemed friend, Mr. Halhed, has made accessible to Europeans, and the Persian translation of which I have had the pleasure of seeing; these laws, which must *in all times* be a singular object of curiosity, are *now* of infinite importance; since the happiness of millions, whom a series of amazing events has subjected to a British power, depends on a strict observance of them.

It is pleasing to remark the similarity, or rather identity, of these conclusions which pure unbiassed reason in all ages and nations seldom fails to draw, in such juridical inquiries as are not fettered and manacled by *positive* institution; and, although the rules of the Pundits concerning *succession to property*, the *punishment of offences*, and the *ceremonies of religion*, are widely different from ours, yet, in the great system of *contracts* and

(z) LL. Longobard. lib. 2, tit. 55, s. 35. Constit. Neapol. lib. 2, tit. 34.

the common intercourse between man and man, the *Pootee* of the Indians and the *Digest* of the Romans are by no means dissimilar (a).

Thus, it is ordained by the sages of Hindustan, that [115]
a depositor shall carefully inquire into the character of his intended depositary; who, if he undertake to keep the goods, shall preserve them with *care* and *attention*, but shall not be bound to restore the value of them, if they be *spoiled by unforeseen accident, or burned, or stolen*; unless he conceal any part of them that has been saved, or unless *his own effects be secured*, or unless the accident happen after his *refusal* to redeliver the goods on a demand made by the depositor, or while the depositary, against the nature of the trust, presumes to *make use* of them: in other words, "the bailee is made answerable for *fraud*, or for *such negligence* as approaches to it (b)."

So, a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing after the completion of the business for which he borrowed it; but not, if it be *accidentally* lost or *forcibly* seized, before the expiration of the time, or the conclusion of the affair, for which it was lent (c): in another place it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall nevertheless recover his debt with interest, but the debtor shall not be entitled to the value of his pawn (d): and that, if the pledgee use the thing pledged, he shall pay the value of it to the [116]

(a) "Hæc omnia," says Grotius, "Romanis quidem congruunt legibus, sed non ex illis primitus, sed ex æquitate naturali, veniunt: quare eadem apud alias quoque gentes reperire eat." De Jure Belli ac Pacis, lib. 2, cap. 12, § 13.

(b) Gentoo Laws, ch. 4. See before, p. 47. (c) Ibid. See before, p. 68.

(d) Chap. 1, § 1. Before, p. 84, 85.

pledgor in case of its loss or damage whilst he uses it (e).

In the same manner, if a person *hire* a thing *for use*, or, if any *metal* be delivered to a *workman* for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroyed or spoiled by *natural* misfortune or the injustice of the *ruling power*, *unless* it be kept *after the time* limited for the return of the goods or the performance of the work (f).

All these provisions are consonant to the principles established in this essay; and I cannot help thinking that a clear and concise treatise, written in the Persian or Arabian language, on the law of *contracts*, and evincing the general conformity between the Asiatic and European systems, would contribute, as much as any regulation whatever, to bring our English law into good odour among those whose fate it is to be under our dominion, and whose happiness ought to be a serious and continual object of our care.

[117] Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law* on the subject of *bailments*, which have been traced by a short analysis, are recognized and confirmed by the wisdom of nations (g); and I hasten to the third or *synthetical* part of my work, in which, from the nature of it, most of the *definitions* and *rules* already given must be repeated, with little variation in *form*, and none in *substance*: it was at first my design to subjoin, with a few alterations, the Synopsis of Delrio; but, finding that, as Bynkershoek expresses himself, with an honest pride, *I had leisure sometimes to write, but never to copy*; and, think-

(e) Ch. 1. § 2. Before, p. 81. (f) Ch. 4 and ch. 10. Before, pp. 88, 91.

(g) Before, p. 4 and 11.

ing it unjust to embellish any production of mine with the inventions of another, I changed my plan; and shall barely recapitulate the doctrine expounded in the preceding pages, observing the method which logicians call *Synthesis*, and in which all sciences ought to be explained.

III. The Synthesis.

I. To begin then with *definitions*: 1. *Bailment is a delivery of goods in trust, on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed.* Definitions.

2. *Deposit is a bailment of goods to be kept for the bailor without a recompence.*

3. *Mandate is a bailment of goods, without reward, to be carried from place to place, or to have some act performed about them.*

4. *Lending for use is a bailment of a thing for a certain time to be used by the borrower without paying for it.* [118]

5. *Pledging is a bailment of goods by a debtor to his creditor to be kept till the debt be discharged.*

6. *Letting to hire is, 1. a bailment of a thing to be used by the hirer for a compensation in money; or, 2. a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee, on the goods bailed, and that for a pecuniary recompence; or, 3. of care and pains in carrying the things delivered from one place to another for a stipulated or implied reward.*

7. *Innominate bailments are those where the compensation for the use of a thing, or for labour and attention, is not pecuniary; but either, 1. the reciprocal use, or the gift of some other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the use or gift of ano-*

ther thing in consideration of *care* and *labour*, and conversel.

8. *Ordinary neglect* is the *omission* of that *care* which every man of common prudence and capable of governing a family, takes of his own concerns.

9. *Gross neglect* is the want of that care which every man of common sense, how inattentive soever, takes of his own property.

[119] 10. *Slight neglect* is the *omission* of that *diligence* which very circumspect and thoughtful persons use in securing their own goods and chattels.

11. A *naked contract* is a contract made without consideration or recompence.

Rules.

II. The rules, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these:

1. A bailee who derives *no benefit* from his undertaking, is responsible only for *gross neglect*.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for *slight neglect*.

3. When the bailment is *beneficial* to both parties, the bailee must answer for *ordinary neglect*.

4. A *special agreement* of any bailee to answer for more or less, is in general valid.

5. *All* bailees are answerable for actual *fraud*, even though the contrary be stipulated.

6. No bailee shall be charged for a loss by *inevitable accident* or *irresistible force*, except by *special agreement*.

7. *Robbery by force* is considered as *irresistible*; but a loss by *private stealth* is *presumptive* evidence of *ordinary neglect*.

8. *Gross neglect* is a *violation of good faith*.

9. *No action* lies to compel performance of a *naked contract*.

10. A reparation may be obtained by suit for every *damage* occasioned by an *injury*.

11. The negligence of a *servant*, acting *by his master's express or implied order*, is the negligence of the *master*. [120]

III. From these *rules* the following *propositions* are evidently deducible. Propositions.

1. A *depository* is responsible only for *gross* neglect; or, in other words, for a *violation of good faith*.

2. A *depository*, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own goods*, and *they also* be spoiled or destroyed.

3. A *mandatary to carry* is responsible only for *gross* neglect, or a *breach of good faith*.

4. A *mandatary to perform a work* is bound to use a *degree of diligence adequate to the performance of it* (57).

5. A man cannot be compelled by *action* to perform his promise of engaging in a *deposit* or a *mandate*.

6. A reparation may be obtained by suit for *damage* occasioned by the *non-performance* of a promise to become a *depository* or a *mandatary* (58).

7. A *borrower for use* is responsible for *slight* negligence.

8. A *pawnee* is answerable for *ordinary* neglect.

9. The *hirer* of a *thing* is answerable for *ordinary* neglect.

10. A *workman for hire* must answer for *ordinary* [121]

(57) Vide ante, p. 62, n. 27.

(58) Vide ante, p. 57, n. 25.

neglect of the goods bailed, and apply a *degree of skill equal to his undertaking*.

11. A *letter to hire* of his *care* and *attention* is responsible for *ordinary* negligence.

12. A *carrier for hire*, by *land* or by *water*, is answerable for *ordinary* neglect.

Exceptions.

IV. To these *rules* and *propositions* there are some *exceptions*:

1. A man who *spontaneously* and *officiously* engages to *keep* or to *carry* the goods of another, though *without reward*, must answer for *slight* neglect.

2. If a man, through *strong persuasion* and with *reluctance*, undertake the execution of a *mandate*, no more can be required of him than a *fair exertion of his ability*.

3. *All* bailees become responsible for losses by *casualty* or *violence*, after their *refusal* to return the things bailed on a *lawful demand*.

4. A *borrower* and a *hirer* are answerable in *all events* if they *keep* the things borrowed or hired *after the stipulated time*, or *use* them *differently* from their agreement.

5. A *depository* and a *pawnee* are answerable in *all events*, if they *use* the things deposited or pawned.

6. An *innkeeper* is chargeable for the goods of his guest *within his inn*, if the guest be *robbed* by the *servants* or *inmates* of the keeper.

[122] 7. A *common carrier*, by *land* or by *water*, must indemnify the owner of the goods carried, if he be *robbed* of them.

General corollary and remark.

V. It is no exception, but a *corollary*, from the *rules*, that "every bailee is responsible for a loss by *accident* or *force*, however *inevitable* or *irresistible*, if it be occasioned by that *degree of negligence* for which the

nature of his contract makes him generally answerable;" and I may here conclude my discussion of this important title in jurisprudence with a general and obvious remark; that "all the preceding rules and propositions may be diversified to *infinity* by the *circumstances* of every particular case;" on which circumstances it is on the Continent the province of a *judge* appointed by the sovereign, and in England, to our constant honour and happiness, of a *jury* freely chosen by the parties, *finally* to decide: thus, when a painted *cartoon*, pasted on canvas, had been *deposited*, and the bailee kept it so near a damp wall, that it peeled and was much injured, the question "whether the depositary had been guilty of *gross* neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refused to grant a new trial (*h*); but it was the judge who determined that the defendant was by *law* responsible for *gross* negligence only; and if it had been proved that the bailee had kept *his own* pictures of the same sort in the same place and manner, and that *they too* had been spoiled, a new trial would, I conceive, have been granted; and so, if no more than *slight* neglect had been committed, and the jury had, nevertheless, taken upon themselves to decide, against law, that a bailee *without reward* was responsible for it.

[123]

Should the *method* used in this little tract be approved, I may possibly not want inclination, if I do not want leisure, to discuss in the same form *every* branch of English law, *civil* and *criminal*, *private* and *public*; after which it will be easy to separate and mould into distinct works, the three principal divisions; or the *analytical*, the *historical*, and the *synthetical* parts.

Conclusion.

(h) 2 Stra. 1099. Mytton and Cock.

[124] The great system of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain *elements*, either the wise *maxims* of national policy and general convenience, or the *positive* rules of our forefathers, which are seldom deficient in wisdom or utility: if *law* be a *science*, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*; but, if it be *merely* an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will become the greatest lawyer who has the strongest habitual or artificial *memory*. In practice, law certainly employs *two* of the mental faculties; *reason*, in the primary investigation and decision of points *entirely new*; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to yield, if not from a becoming modesty, at least from a just attention to that object for which all laws are framed and all societies instituted, *the good of mankind*.

APPENDIX.

COMMON CARRIERS.

THE degree of responsibility imposed on carriers by the policy of the common law, is so fully treated of in the previous essay, that it will be necessary here to allude to it only incidentally. The following supplementary pages will be employed in considering—1st. Who are deemed common carriers. 2ndly. What are their duties and obligations. 3rdly. What are the risks for which they are liable by common law or statute. 4thly. The commencement and termination of their risks. 5thly. What will excuse or justify a non-delivery of the goods. 6thly. The doctrine of average and contribution. 7thly. The general rights of carriers. Lastly, the rights, duties, and obligations of carriers of passengers will be considered in a separate article.

I. *Who are deemed Common Carriers.*—It is not every person who undertakes to carry goods for hire, that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incurs no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary di-

ligence (*a*). To bring a person within the description of common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*. A common carrier has, therefore, been defined to be—one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place (*b*).

Common carriers are generally of two descriptions. 1. Carriers by land. 2. Carriers by water. Of the former description are the proprietors of stage-waggon and stage-coaches, which ply between different places, and carry goods for hire (*c*). So, truckmen, carters, and porters who undertake to carry goods for hire, as a common employment, from one part of a town or city to another. Of the latter description are the owners and masters of ships and steam-boats engaged in the transportation of goods generally for hire. So are lightermen, hoymen, barge-owners, ferry-men, canal-boatmen, and others employed in like manner (*d*).

But the proprietors of stage-coaches, whose employment is solely to carry passengers, are not deemed common carriers (*e*). They are not responsible for mere accidents happening to the persons of passengers, but only for want of that due care which is required of bailees for

(*a*) Bac. Abr. Carriers, A. Robinson v. Dunmore, 2 Bos. & Pul. 417. Hodgson v. Fullerton, 4 Taunt. 787. Hatchwell v. Cooke, 6 Taunt. R. 577.

(*b*) 1 Salk. 249.

(*c*) 2 Ld. Raym. 909, 918. Jones, ante, 104, 106. 5 T. R. 389. Forward v. Pittard, 1 T. R. 27. Bac. Abr. Carriers, A.

(*d*) Jones, ante, 106, 107, 108. Bac. Abr. Carriers, A. Mors v. Slew, 1 Mod. 85. 1 Vent. 190. 238. T. Raym. 220. 2 Lev. 69.

(*e*) Bac. Abr. Carriers, A.

hire ordinarily (*f*). But, if they are accustomed to carry the baggage of passengers, although for no specific compensation, yet they are responsible at least for due and reasonable care of such baggage; and it seems not quite settled whether, as to passengers' baggage, without any distinct compensation, coach proprietors are not liable as common carriers. In a late case, *Best, C. J.*, seems to have placed the responsibility of coach proprietors, carrying passengers and their baggage, upon the ordinary footing of common carriers, as to their baggage (*g*). If the proprietors of a stage-coach for passengers carry goods also for hire, they are, in respect to such goods, to be deemed common carriers (*h*).

The like reasoning applies to packet ships and steam-boats, which ply between different ports, and are accustomed to carry merchandize as well as passengers.

When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandize for persons in general; such as vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination (*i*).

A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he re-

(*f*) *Aston v. Heaven*, 2 Esp. N. P. C. 533. *Christie v. Griggs*, 2 Camp. N. P. C. 79. *Dudley v. Smith*, 1 Camp. 167. *White v. Boulton*, Peake N. P. C. 81. *Robinson v. Dunmore*, 2 Bos. & Pul. 417.

(*g*) *Brook v. Pickwick*, 12 J. B. Moore, 447, 4 Bing. 218.

(*h*) *Bac. Abr. Carriers, A.* *Lovett v. Hobbs*, 2 Show. R. 128. 1 Salk. 282. *Upshaw v. Aidee*, Com. R. 25.

(*i*) *Abbott on Shipping*, p. 3, ch. 2, ss. 1, 2.

ceives a compensation from the owners, but who has no concern in the vessels or waggons by which they are transported, and no interest in the freight, is not to be deemed a common carrier, but a mere warehouseman and agent.

In the case of *Dale v. Hall* (*k*), it would seem to have been held, that a person who undertakes to carry goods by water is liable as a common carrier, notwithstanding the declaration does not allege him to be a common carrier, but is founded upon a special contract. That case was, in fact, against a common hoyman, for the negligent loss of goods; and the court was of opinion, that, as he was a common hoyman, evidence to shew that he was, in fact, guilty of no negligence, was improperly admitted in his defence. It is difficult to perceive how, upon the actual frame of the declaration, any general responsibility as a common carrier could be imputed. And the case, if it proceeded upon the notion that every carrier by water for hire is to be deemed a common carrier, and responsible as such, is inconsistent with later decisions (*l*).

In order to charge a person as a common carrier, it is not necessary that a specific sum should be agreed on for the hire; for, if none is agreed on, he is entitled to a reasonable compensation (*m*).

When several persons are engaged in the business of common carriers on land, and, by contract between them, one finds horses and drivers for certain stages, and the

(*k*) 1 Wils. R. 281.

(*l*) *Hutton v. Osborne*, Selw. N. P. 393. *Robinson v. Dunmore*, 2 B. & P. 417. *Boucher v. Lawson*, Cas. Temp. Hard. 194.

(*m*) *Bastard v. Bastard*, 2 Show. R. 81. Id. 129.

other supplies them for the remaining stages, they are, notwithstanding, to be treated as partners, and jointly responsible throughout the whole course of their route (*n*). And the same principle applies to different partners in a coach-office, who are owners or partners in different coaches employed at the same office on the common business; though they have not a common interest in each coach. All of them will be held responsible as partners for any contract made by the keeper of the office, for any loss of a package sent by either of the coaches in which the keeper is a partner (*o*).

Common carriers are not only responsible for their own acts, but for those of their servants and other persons in their employment (*p*). And any arrangements made between the carriers and their servants or agents, so that the latter may exclusively receive the compensation for the carriage of particular packages (as money), will not exempt the carriers from responsibility for the loss, unless the party contracts exclusively with the servants or agents.

II. *Of the Duties and Obligations of Common Carriers.*—One of the duties of a common carrier is to receive and carry all goods offered for transportation, upon receiving a suitable hire. This is the result of his public employment as a carrier; and, by the custom of the realm, if he will not carry goods for a reasonable compensation, upon a tender of it, he will be liable to an action, unless

(*n*) *Waland v. Elkins*, Holt, N. P. C. 227. 1 Stark. N. P. C. 272.

(*o*) *Helsby v. Mears*, 5 B. & C. 504.

(*p*) *Cavenagh v. Such*, 1 Price R. 328. *Williams v. Cranston*, 2 Stark. N. P. C. 82. *Middleton v. Fowler*, 1 Salk. 282. *Hyde v. Trent and Mersey Nav. Co.* 5 T. R. 397. *Ellis v. Turner*, 8 T. R. 531.

there is a reasonable ground for the refusal (*q*). If a carrier refuses to take charge of goods because his carriage is full; or because the goods are of a nature that will at the time expose them to extraordinary danger, or to popular rage; or, because the goods are not of a sort which he is accustomed to carry; or, because he has no convenient means of carrying such goods with security, or they are brought in an unseasonable time: these will furnish reasonable grounds for his refusal; and will, if true, be a sufficient legal defence to a suit for the non-carriage of the goods (*r*). A carrier is not obliged to receive goods until he is ready to set out on his accustomed journey (*s*).

Another duty of carriers is, to take the utmost care of the goods from the moment of receiving them; to obey the directions of the owner in respect to them (*t*); to carry them safely to the proper place of destination; and to make a right delivery of them there, according to the usage of trade or the course of business (*u*). They are also bound to furnish suitable vehicles for the transportation, with all reasonable equipments, and servants to

(*q*) *Bac. Abr. Carriers, B. Boulton v. Sandiford, Skin. R. 279. Jackson v. Rogers, 2 Show. R. 328. 1 Saund. R. 312 c. Riley v. Horne, 2 Moore & Payne, 333, 5 Bing. 217, 224.*

(*r*) *Jackson v. Rogers, 2 Show. R. 327, 328. 1 Saund. 312, n. Lane v. Cotton, 1 Ld. Raym. 646. Batson v. Donovan, 4 B. & Ald. 32. Lovett v. Hobbs, 2 Show. R. 128. 12 Mod. 3. Edwards v. Sherratt, 1 East, R. 604.*

(*s*) *Lane v. Cotton, 1 Ld. Raym. 652. 1 Com. R. 105.*

(*t*) *Streeter v. Horlock, 7 Moore, 283, 1 Bing. 34.*

(*u*) *Streeter v. Horlock, 7 Moore, 283, 1 Bing. 34. Hyde v. Trent and Mersey Nav. Co. 5 T. R. 389. Forward v. Pittard, 1 T. R. 27. Ellis v. Turner, 8 T. R. 531. Davis v. Garrett, 4 Moore & Payne, 540, 6 Bing. 716.*

take care of them. If the carriage is to be by water, they are bound to provide a ship tight, staunch, and strong, and suitably equipped for the voyage, with proper officers, and a proper crew (*x*); to proceed without deviation to the proper port; to expose the goods to no improper hazards; and to guard against all injuries incident to the property, by reasonable care in preserving the goods from the effects of storms, of bad air, of leakage, and of embezzlements (*y*). In short, every carrier is bound to all the diligence which prudent and cautious men in the like business usually employ for the safety and preservation of the property confided to his charge. If the carrier deviates from the voyage, he is responsible for all losses, even from inevitable casualty; for, under such circumstances, the loss is traced back through all the intermediate causes to the first departure from duty (*z*).

III. *What are the Risks for which they are liable by the Common Law.*—A carrier, by the common law, is liable for all losses, except such as come by the act of God or the king's enemies. The expression *act of God*, denotes natural accidents, such as lightning, earthquakes, and tempests, and, it is said, all accidents and misfortunes arising from inevitable necessity. By the king's enemies is to be understood enemies at open war, and not merely robbers, thieves, or other private depredators, however much they may be deemed, in a moral sense, at war with society. Losses, therefore, which are

See p 1024

(*x*) *Lyon v. Mells*, 5 East, R. 428. *Amies v. Stevens*, 1 Str. 128.

(*y*) *Abbott on Shipping*, p. 3, ch. 3, s. 1 to 12. *Lyon v. Mills*, 5 East, R. 428.

(*z*) *Davis v. Garrett*, 4 Moore & Payne, 540, 6 Bing. 716.

occasioned by robbery on the highway, or by the depredations and violence of mobs, rioters, and insurgents, and other felons, are not deemed losses by enemies; but losses by pirates on the high seas are so deemed, for, pirates are the common enemies of all mankind.

But a carrier may limit his liability by special contract. Thus, the owners of ships limit their liability by an exception of certain risks specified in the bill of lading. In the bill of lading in use in England, there is the following exception:—"The act of God, of the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, as far as ships are liable thereto, excepted;" and carriers by land, formerly, for the same purpose, issued and published general notices, which were held binding on all who were proved or could be presumed to have received or known them.

The liability of certain classes of common carriers has also been restricted by various acts of parliament.

1. *As to the Statutory Restrictions on the Liability of Carriers by Water.*—Several acts have been passed to limit the responsibility of ship-owners. By the 7 Geo. 2, c. 15, after reciting the liability of the owners of vessels for the loss of goods shipped on board their vessels, although the loss was occasioned by the master or mariners, without the knowledge or privity of the owners, it is enacted (s. 1), "That the owners shall not be liable for any loss or damage by reason of any embezzlement, parting or making away with (by the master or mariners), of any gold, silver, diamonds, jewels, precious stones, or other goods, shipped, taken in, or put on board any vessel, or for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incur-

red by the master or mariners, without the privity of the owners, *further than the value of the vessel, with her appurtenances, and the full amount of freight due or to grow due for the voyage.*"

The 2nd section provides the mode of distributing the indemnity, in case the loss exceeds the value of the ship and freight. In that case, the several claimants are to be paid by average, according to the proportions of their losses. The 3rd section empowers the owners to file a bill for a discovery of the total amount of the losses, requiring of them, at the same time, to pay the value of their ship and freight into Court.

The first section of this act was held to apply to a case of robbery by pirates on the Thames, to which one of the mariners was accessary, by giving the robbers intelligence (a).

By the next act (26 Geo. 2, c. 86), after reciting that the former act was confined to the single case of a loss happening with the privity or through the fault of the master or mariners, the owners, in sect. 2, are exempted from responsibility, in case of loss or damage by fire; and, by sect. 3, from all loss, in any case whatever, in respect of gold, silver, diamonds, watches, jewels, or precious stones, unless the owner or shipper thereof, at the time of shipping the same, should insert in his bill of lading, or otherwise declare in writing, their true nature, quality, or value.

The first of these two statutes, it has been seen, applies only to the case of a loss happening by the fault of the master or mariners. It would, therefore, not extend to

(a) Sutton v. Mitchell, 1 T. R. 18.

the case of a loss which should happen by the fault or act of any person not being either master or a mariner. The 53 Geo. 3, c. 159, meets this point (b); it also extends the relief of the former act to "part-owners," and to the case of "any loss or damage arising or taking place by reason of any act, neglect, matter, or thing, done, omitted, or occasioned," without the privity of the owners. Each of these acts reserves the common law remedies against the master and mariners; and by the last it is declared that it shall not extend to lighters, or vessels used solely in inland navigation, nor to any ship not duly registered. Though the master through whose fault a loss arises is himself a part-owner, the other owners are entitled to the benefit of the statute (c).

The 6 Geo. 4, c. 125, regulates the pilotage of vessels on certain rivers, and within certain limits. By one of its sections, it is provided that the owners shall not be liable for any loss arising in consequence of there being no pilot on board, unless it shall appear that there was a *refusal* to take a pilot (according to the requirement of the act), or that the master wilfully neglected to use all practicable means of having a pilot; but, in any case under that act, the owners are not to be liable to a greater amount than the value of the ship and freight, and are not to be liable at all if the loss happens through the incompetency of the pilot.

2. *As to the Statutory Restrictions on the Liability of Carriers by Land.*—To relieve themselves from the rule of the common law, it had become very generally the practice of coach proprietors and carriers to circulate notices that they would not be responsible for

(b) *Wilson v. Dickson*, 2 B. & Ald. 2.

(c) *Ibid.*

certain kinds of goods of more than 5*l.* value, unless entered and paid for accordingly. But this expedient, in a great many cases, was inefficacious, from the difficulty of proving the notice to have come to the knowledge of the other party. At length parliament interfered. By the statute 11 G. 4 & 1 W. 4, c. 68 (*d*), it is enacted, (s. 4), that the public notices alluded to should be of no avail after the 1st of September, 1830: in lieu of them, however, another section (s. 1) enacts, that no carrier shall be responsible for any loss or injury to certain descriptions of goods of more than 10*l.* value, unless the nature and value is declared at the time of the delivery, and an insurance rate paid for their carriage. The goods enumerated are the following—“Gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Bank of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for the payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace.” All articles of these descriptions of above the specified value are within this provision, whether they are carried for hire or are passengers’ luggage. But no carrier is entitled to the benefit of this restriction until he causes a notice to be fixed up in his booking office,

(*d*) See the act, post.

(s. 3), stating the increased rates required as a compensation for the carriage of the hazardous articles, nor unless, upon receiving the increased rate, he gives, if asked for it, a receipt for the parcel, acknowledging the insurance.

Upon this act, I will presume to make only two remarks by way of comment. 1. The fourth section, I apprehend, leaves the carrier still at liberty to make a special contract in the usual form of entering into contracts; and it merely nullifies any inference of a special contract from the publication or receipt of a general notice. By this provision a great deal of litigation is avoided, and the substituted advantages seem equally well considered in respect both to the interests of the public and of carriers. 2. Though, in any case, the value of any parcel should be declared at less than its actual value, still, I conceive, the carrier would be liable to the extent of the declared value, but no further (see s. 6), unless, from the difference between the actual and the declared value, or from any other circumstance, the under-representation could be deemed a fraud upon the carrier; in which case, the principle would apply, according to which, before the act, carriers were held exempt from liability in cases of unfair concealment of the nature of the property entrusted to them (*e*).

In all cases of loss, it seems that the onus probandi is on the carrier, to exempt himself from liability; for, *prima facie*, the law imposes the obligation of safety on him (*f*). And, it seems, that the breaking down or over-

(*e*) *Edwards v. Sherratt*, 1 East, 604. *Batson v. Donovan*, 4 B. & Ald. 21. *Gibbon v. Paynton*, 4 Burr. 2298. *Titchburne v. White*, 1 Str. 145.

(*f*) *Forward v. Pittard*, 1 T. R. 27, 33. *Whalley v. Wray*, 3 Esp.

turning of a stage-coach is *prima facie* evidence of negligence on the part of the proprietor and his servants (*g*).

In respect to the property carried, it matters not, whether it be money (*h*) or goods, or other moveable merchandize: the carrier is equally responsible for each. But, in respect to goods in a carrier-vessel, which are shipped to be stowed on deck, as they are, from their situation, peculiarly liable to be thrown overboard to lighten the vessel in case of distress; if they are necessarily so thrown overboard, the carrier is exonerated, and the owner of the goods must bear the loss without contribution (*i*). But, if such goods are, without the consent of the owner, or a general custom binding him, stowed on deck, and, on that account, ejected in tempestuous weather, the carrier will be chargeable with the loss (*k*).

The case of *Barcroft*, as cited by Lord Chief Justice Rolle, would seem to imply a responsibility in the carrier even in cases of jettison (*l*). But, if the doctrine of the case be, that jettison will not, in a case of clear necessity, discharge the carrier, it is not law; for, it was expressly decided in Lord Coke's time, in the case of a bargeman, that, where goods were thrown overboard in a great storm, to save the lives of the passengers, by lightening the barge, the bargeman was exonerated; for,

N. P. C. 74. *Riley v. Horne*, 2 Moore & Payne, 333, 5 Bing. 227, 226.

(*g*) *Christie v. Griggs*, 2 Camp. N. P. C. 79.

(*h*) This must be understood subject to the exemptions of the statute 11 G. 4 & 1 W. 4, c. 68, for the provisions of which, see ante, x., and post.

(*i*) *Abbott on Shipp.* p. 3, ch. 8, s. 13.

(*k*) *Story*, s. 530, citing *Barber v. Bruce*, 3 Connect. R. 9. 1 Cain, R. 48.

(*l*) See ante, p. 107.

the storm was the act of God, and the occasion of throwing them overboard (*m*).

IV. *As to the Commencement and Termination of the Risk of Common Carriers.*

1. *The Commencement of the Risk.*—To render a carrier responsible, there must be an actual delivery to him or to his servants, or to some other person authorized to act in his behalf; and, as soon as such delivery is complete, the responsibility of the carrier as such commences. But it is often a matter of great nicety to decide, upon the circumstances of the case, whether there has been such a delivery or not. Thus, where goods were left in the yard of an inn, where the carrier and other carriers put up, but no actual delivery to the carrier or his servant was proved, it was deemed not a complete delivery to the carrier, so as to charge him with the custody (*n*). So, where goods were delivered at a wharf, to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, this was held not a sufficient delivery to charge him, either as wharfinger or carrier, with the custody of the goods (*o*). And, where, by the usage of the business, a delivery of goods on the dock near the carrier boat (as in the case of a carrier canal-boat) is a good delivery so as to charge the carrier, it must be understood with this qualification, that due notice is given to him of the fact; for, otherwise, he will not be chargeable, since, until he has knowledge that the goods are on the dock for the

(*m*) Cited by Lord Coke in *Bird v. Astock*, 2 Bulst. R. 280. Jones, ante, 108.

(*n*) *Solway v. Holloway*, 1 Ld. Raym. 46.

(*o*) *Buckman v. Levi*, 3 Camp. N. P. C. 414.

purpose of being carried, he has no right to assume any custody of them (*r*).

The liability of carriers attaches from the time of their acceptance of the goods, whether that acceptance is in a special manner, or according to the usage of their business (*s*). But an acceptance in some way, either actual or constructive, is indispensable (*t*). And, where goods are actually put into the waggon or barge of a carrier, he will not be chargeable, if it appears that there is no intention to trust him with the custody, as, if the owner is uniformly in the habit of placing his own servant on board as a guard, who exclusively takes upon himself the management and custody of them (*u*). But, the mere fact that the owner or his servant goes with the goods, if the other circumstances of the case do not exclude the custody of the carrier, will not, of itself, exempt him from responsibility (*x*).

It is in many cases the usage of the masters and owners of ships to receive goods on the quay or beach, or in their boats, or at the wharf or warehouse of the shipper or his agent; or to take them at other special places into the custody of the mate, or other proper officer of the ship. In all such cases, their liabilities as carriers commence at the instant of such acceptance of the goods (*y*).

But it sometimes happens that a party is at once a warehouseman or an inn-keeper and a carrier, and that, after a receipt of the goods, and before their being put

(*r*) Story, s. 532, citing *Packard v. Getman*, 6 Cowen, R. 757.

(*s*) *Dale v. Hall*, 1 Wils. 284. *Boehme v. Combe*, 2 M. & S. 172.

(*t*) *Abbott on Shipp.* p. 3, ch. 3, s. 2.

(*u*) *E. I. Comp. v. Pullen*, 1 Str. R. 690.

(*x*) *Cobban v. Downe*, 5 Esp. N. P. C. 41.

(*y*) *Robinson v. Dunmore*, 2 B. & P. 419.

in itinere, they are lost or destroyed (z). In such cases the question often arises, in what capacity the receiver is liable, and the material point on which it depends is, whether the one or the other character predominates in the particular stage of the transaction. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier begins at the receipt of the goods (a). So, if an inn-keeper is at the same time a carrier, and goods are sent to his inn and received by him for transportation, he is liable as carrier for any loss before they are put upon their transit (b).

On the other hand, if a person is at the same time a common carrier and a forwarding merchant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners; if the goods are lost by fire before such orders are received, or the goods are put in transit, he is not chargeable as a common carrier, but only as a warehouseman (c).

2. *The Termination of the Carrier's Risk.*—As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases (d). Some cases illustrative of this doctrine have already been considered under another head (e). If a carrier between A. and B. receives goods to be carried from A. to B., and thence to be forwarded

(z) Ante, p. 97, n.

(a) *Forward v. Pittard*, 1 T. R. 27.

(b) Buller, J.'s, opinion in *Hyde v. Trent & Mersey Nav. Co.* 5 T. R. 389.

(c) Ante, p. 97, n.

(d) Ante, *Ibid.*

(e) Ante, *Ibid.*

by a distinct conveyance to C., as soon as he arrives with the goods at B., and deposits them in his warehouse there, his responsibility as carrier ceases; for, that is the termination of his duty as such. He then becomes, as to the goods, a mere warehouseman, undertaking for their farther transportation (*f*). And the like result would be, if the goods were destined to B. only, if it is not, by the custom of the business, the carrier's duty to deliver the goods to the consignees there, but simply to deposit them in his warehouse (*g*). But, if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by such a deposit; but he is chargeable for any loss which occurs, until an actual delivery to the party (*h*). So, he is chargeable, in like manner, for any loss during a deposit in any warehouse at an intermediate stage of the journey between A. and B. (*i*). And if, notwithstanding any custom to the contrary, the carrier specially undertakes to deliver the goods to the owner, he is chargeable for any loss before such delivery, although, in all respects, he has followed the general custom of the place (*k*).

On the other hand, however universal the custom may be to deliver the goods to the owner at the place of destination, still the parties may, by their contract, waive it; and if they do, the carrier is discharged (*l*).

(*f*) *Garside v. Trent & Mersey Nav. Co.* 4 T. R. 581.

(*g*) *In re Webb*, 8 Taunt. R. 443, 2 J. B. Moore, 560.

(*h*) *Hyde v. Trent Nav. Co.* 5 T. R. 389. *Golden v. Manning*, 3 Wils. R. 429, 2 Bl. R. 916. *Catley v. Wintringham, Peake*, N. P. C. 150.

(*i*) *Ibid.*

(*k*) *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693.

(*l*) *Strong v. Natally*, 4 B. & P. 16. *Sparrow v. Carruthers*, 2 Str. R. 1236

As, if the owner, after the arrival of the goods, requests the carrier to let them remain in his warehouse until the owner can conveniently send for them; and they are there deposited, and are afterwards destroyed by fire; the duty of the carrier being at an end, he is not responsible for the loss in that character. So, if a man, having no warehouse of his own, directs the carrier to leave his goods at the waggon office, until he should find it convenient to remove or sell them, the carrier's responsibility will terminate with the deposit (*m*).

In all cases of this sort, the material consideration is, whether the owner of the goods has taken any exclusive possession of them, or has terminated the custody of the carrier by any act or direction which does not flow from the duty of the carrier. So long as the carrier retains possession of the goods, or is to perform any further duty, either by custom or contract, as carrier, he is responsible for their safety. But, when the transit is ended, and the delivery is either completed or waived by the owner, then the responsibility of the carrier ceases (*n*). So, if the goods, after their arrival, are put on board of a lighter in the customary way, and the owner takes an exclusive custody of them before they are landed, the carrier is discharged from any subsequent loss (*o*).

A question often arises, in practice, whether the carrier is bound to make a personal delivery of the goods to the owner, or not. This may admit of different answers, according to circumstances. The manner of de-

(*m*) *Richardson v. Goss*, 3 Bos. & P. 119. *Scott v. Petit*, 3 Bos. & P. 472. *Dixon v. Baldwin*, 5 East, R. 181. *Rowe v. Pickford*, 1 J. B. Moore, R. 526.

(*n*) *Abbott on Shipp.* p. 3, ch. 3, § 12.

(*o*) *Strong v. Nataly*, 4 Bos. & P. 16.

delivering the goods, and consequently the period at which the responsibility of the carrier will cease, may, in many instances, depend upon the custom of particular places, and the usage of particular trades, or upon special contract between the parties. If there is any special contract between the parties, or any local custom or usage of trade on the subject, the former will prevail as an express, and the latter as an implied term in the contract (*p*). But, in the absence of any special contract, or custom, or usage, probably no general rule can be laid down. There seems a strong inclination at present to hold (though there is some diversity of judicial opinion,) that the carrier is bound, generally, to make a delivery to the owner, unless there is some custom of trade, or some contract to the contrary. Lord Kenyon was strenuously the other way; but three other judges on that occasion differed from him (*q*): and, on more recent occasions, the opinions of other distinguished judges have settled down in favour of the doctrine of the three judges against him (*r*). However this may be, it seems clear that carriers are bound to give notice of the arrival of goods to the persons to whom they are directed, if they are known to them, and within a reasonable time: they must take care at their peril that the goods are de-

(*p*) *Hyde v. Trent Nav. Co.* 5 T. R. 389. *Catley v. Wintringham*, Peake N. P. C. 150. *Golden v. Manning*, 3 Wils. R. 429. *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693. *In re Webb*, 8 Taunt. R. 443; S. C. 2 J. B. Moore, 560.

(*q*) *Hyde v. Trent Nav. Co.* 5 T. R. 389.

(*r*) *Duff v. Budd*, 3 Brod. & Bing. R. 177, 6 J. B. Moore, R. 469. *Bodenham v. Bennett*, 4 Pri. R. 31. *Birkett v. Willan*, 2 B. & Ald. 356. *Garnett v. Willan*, 5 B. & Ald. 58. *Storrs v. Crowley*, 1 M'Clel. & Y. 129. *Stephenson v. Hart*, 1 Moore & P. 357, 4 Bing. R. 476.

livered to the right person; for, otherwise, they will become responsible (s).

It was said in one case by Mr. Justice Buller, that, when goods are brought into England from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry them from port to port. A ship, trading from one port to another, has not the means of carrying goods on land; and therefore, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier (t). If, however, the consignee of goods requires goods to be delivered to himself on board of the ship, and directs them not to be landed on a wharf, it is said that the master must obey the request; for, the wharfinger has no right to insist upon the goods being landed at his wharf, although the vessel be moored against it (u). If the consignee is unable, or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf; but it is his duty to take care of them for the owner (x).

Cases may often occur where a person is at once a carrier of goods and an agent or factor for the sale of them; and the inquiry may present itself, when, under such circumstances, his liability as carrier terminates. Suppose the owner of a ship is master, and also is consignee of the goods of shippers, which were put on board for sale, when do his rights and responsibility commence and terminate in such capacity? It has been decided, that,

(s) *Golden v. Manning*, 3 Wils. R. 429. *Garnett v. Willan*, 5 B. & Ald. 58.

(t) *Hyde v. Trent Nav. Co.* 5 T. R. 389.

(u) *Syeds v. Hay*, 4 T. R. 260.

(x) *Stephenson v. Hart*, 1 Moore & P. 357; 4 Bing. R. 476.

during the voyage, he retains the character of owner and master, and of course, during the voyage, he is responsible as carrier (*y*). But, after his arrival at the port of destination, and the landing of the goods there, it would seem that his duty as carrier is at an end.

V. *What will excuse or justify a Non-delivery of the Goods by the Common Carrier.*—From what has been said, it appears to be a sufficient excuse or justification for him to shew, that, without any negligence on his part, the goods have been lost by the act of God or of the king's enemies; that they are of the description for which he is not answerable without an insurance, and that there is no insurance; or that he is excused by a special contract. There are also cases where the carrier's own agency is concerned in the loss, which, however, is by law deemed excusable. Thus, in cases of throwing overboard goods, to lighten a ship or boat, and preserve life, the carrier will be excused if it has arisen from necessity. Thus, if a ferry-man was to throw overboard a box of jewels in a storm, he would be excused, if it was done from absolute necessity, to save life (*z*). But, if it was done without necessity, or rashly and imprudently, it would be otherwise (*a*).

A carrier may also shew, in his defence, that the goods have perished by some internal defect, without any fault on his part; for, his warranty does not extend to such cases. And if, from the nature of the goods carried, they are liable to peculiar risks, and the carrier takes all

(*y*) *Earl v. Rowcroft*, 8 East, R. 126, 140.

(*z*) *Mouse's case*, 12 Co. R. 63.

(*a*) *Barcroft's case*, Aleyne, R. 93. 2 Bulst. 280. 2 Rolle Abr. 567.

reasonable care, and uses all proper precautions to prevent injuries, he is excused if they are destroyed in consequence of such risks. Thus, if horses or other animals are carried by water, and, in consequence of a storm, they break down the partitions between one another, and some are killed by kicking, the carrier will be excused, and the loss will be deemed a loss by perils of the sea (*δ*).

A non-delivery will also be excused by any act of the shipper which discharges the carrier from any further responsibility. As, if, with the consent of the shipper, he delivers them over to another carrier, or deposits them at an intermediate place to await the future orders of the shipper; or, if the shipper takes them into the exclusive custody of himself or his own servants (*c*). But, it will be otherwise if he merely accompanies them in their transit, not exercising any exclusive custody (*d*).

In like manner, the carrier will be excused for a non-delivery, if it has been occasioned by the illegal act of the shipper. Thus, if the goods have been forfeited by the illegal act of the shipper, and are seized for the forfeiture, the carrier is discharged. But, a mere seizure for a supposed forfeiture, if in fact without cause, leaves the carrier still bound by his contract (*e*).

But an excuse which, practically, is much more important and extensive is that resulting from the right of the shipper to stop the goods in the possession of the carrier

(*b*) *Gabay v. Lloyd*, 5 Dowl. & R. 641; 3 B. & C. 733. *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

(*c*) *Sparrow v. Carruthers*, 2 Str. 1236. *Hurry v. Royal Exch. Assur. Co.* 2 B. & P. 430. *East India Co. v. Pullen*, 1 Str. 690. *Strong v. Nataly*, 4 B. & P. 16.

(*d*) *Robinson v. Dunmore*, 2 B. & P. 419.

(*e*) *Gosling v. Higgins*, 1 Camp. N. P. C. 451.

while they are still in transit. This right is commonly called the right of stoppage *in transitu*. When it arises, and is properly exercised, the carrier is completely discharged from all further responsibility.

Another excuse is, when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. It is generally true, that the carrier cannot dispute the title of the person who delivers the goods to him, or set up an adverse title to defeat his right of action growing out of his own contract (*f*). But this is true only when that adverse claim is not asserted by the superior himself, but merely by the carrier, of his own motive. Where the adverse title is made known to the carrier; as, if he is forbidden to deliver goods to any other person, he does it afterwards at his peril; and, if the adverse title is well founded, and he resists it, he is liable to an action (*g*).

VI. *The Doctrine of Average and Contribution.*—This principally arises in cases of jettison and other accidents in the transportation of goods by sea. In such cases, where goods are thrown overboard for the common benefit, or other positive sacrifices are made, or expenses incurred for the same purpose, the law allows a compensation to those who have incurred the loss or expense, and they may demand a *pro rata* contribution from all other persons deriving a benefit therefrom, according to their interest, towards the loss or expense. This, in cases of accidents at sea, is called a general average, or general contribution, in which ship, cargo, and freight are compelled to contribute, according to their value, to re-

(*f*) 1 Esp. N. P. C. 115.

(*g*) Taylor v. Plumer, 3 Mau. & Selw. 562. Wilson v. Anderton, 1 B. & Adol. 450.

pay the common loss. But, the full discussion of this subject properly belongs to a treatise on the law of shipping.

Carriers on land may also entitle themselves, if not to a common contribution in the nature of a general average, at least to a compensation for expenses necessarily incurred about the preservation of the goods from extraordinary perils, not properly belonging to themselves as carriers. Thus, if a sudden flood or storm should do injury to the goods, and require some immediate expense for their preservation, the carrier would be bound to incur it, and would be entitled to a reimbursement.

VII. *The general Rights of Carriers.*—In virtue of the delivery of the goods, they acquire a special property in them, and may maintain an action against any person who displaces that possession, or does any injury to them. This right arises from their general interest in conveying the goods, and their responsibility for any loss or injury to them during their transit (*h*). And, having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage is dispensed with, unless upon being paid his due remuneration; for, by the delivery he has already incurred risks (*i*).

A carrier is in all cases entitled to demand the price of carriage before he receives the goods; and, if not paid, he may refuse to take charge of them. If, however, he takes charge of them without the hire being paid, he

(A) Bac. Abr. Carriers, C. Goodwin v. Richardson, Roll. Abr. 5. 1 Ld. Raym. 278. Wilbraham v. Snow, 1 Vent. 52. 2 Saund. R. 476. Id. 47 c, note.

(i) Story, s. 585, citing 9 Johns. R. 17; 3 Johns. Cas. 93.

may afterwards recover it (*k*). The compensation which becomes due for the carriage of goods by sea is commonly called freight; and the circumstances under which the whole, or a part only, of the freight is earned, forms a head of great practical importance under the law of shipping. It will accordingly be found considered at large in professed treatises on that subject (*l*). The carrier is also entitled to a lien on the goods for his hire, and is not compellable to deliver them until he receives it, unless he has entered into some special contract, by which it is waived (*m*). His lien may also be defeated by giving up the possession of the goods; and, if it is once waived, it cannot afterwards be resumed (*n*).

It is the consignor, or shipper, who is ordinarily bound to the carrier for the hire or freight of the goods (*o*). But, whenever the consignee engages to pay it, he also may become responsible. It is usual for bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight; in which case the consignee and his assigns, by accepting the goods, become, by implication, bound to pay the freight (*p*).

(*k*) *Wright v. Snell*, 5 B. & Ald. 353. *Jackson v. Rogers*, 2 Show. 327. *Mors v. Slew*, 1 Vent. 238. *Batson v. Donovan*, 4 B. & Ald. 32. 1 Saund. R. 312 *a*.

(*l*) See *Abbott on Ship.* p. 3, c. 7.

(*m*) *Skinner v. Upshaw*, 1 Ld. Raym. 752. *Sodergren v. Flight*, 6 East, R. 662. *Hutton v. Bragg*, 2 Marsh. R. 345. *Stevenson v. Blacklock*, 1 M. & S. 543. *Chase v. Westmore*, 5 M. & S. 186. *Crawshay v. Homfrey*, 4 B. & Ald. 50. *Rushforth v. Hadfield*, 6 East, R. 522.

(*n*) *Kinloch v. Craig*, 3 T. R. 119. *Sweet v. Pym*, 1 East, R. 4. *Yates v. Railston*, 8 Taunt. R. 293.

(*o*) *Moore v. Wilson*, 1 T. R. 659.

(*p*) *Dougal v. Kemble*, 11 J. B. Moore, 250, 3 Bing. R. 383.

And the fact that the consignor is also liable to pay the freight, will not, in such a case, make any difference (*q*).

OF CARRIERS OF PASSENGERS.

Eighthly. Having considered the rights, duties, and obligations of carriers of goods for hire, we may now pass to the consideration of *carriers of passengers*. And first of *passenger carriers on land*.

1. *Their Duties on the Commencement of the Journey.*—The first and most general obligation on their part is, to carry passengers whenever they offer themselves and are ready to pay for their transportation. This results from their setting themselves up, like innkeepers, farriers, and carriers of goods, for common public employment. They are no more at liberty to refuse a passenger, if they have sufficient room and accommodation, than an innkeeper has to refuse a guest (*r*). If several persons have contracted to go in company inside, the carriers have no right to separate them into different parts of the coach outside and inside (*s*).

In the next place, they are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to such journey (*t*).

(*q*) Dougal v. Kemble, 11 J. B. Moore, 350, 3 Bing. R. 383. Moorsom v. Kymer, 2 M. & S. 303.

(*r*) Brotherton v. Wood, 3 Brod. & B. 54. 9 Pri. R. 408. 6 J. B. Moore, R. 141. Ansell v. Waterhouse, 2 Chitty, R. 1. Mer-sitor v. Cooper, 4 Esp. N. P. C. 260.

(*s*) Long v. Horne, 1 Carr. & P. N. P. C. 610.

(*t*) Bremner v. Williams, 1 Carr. & P. N. P. C. 144. Crofts v. Waterhouse, 11 J. B. Moore, 133, 3 Bing. R. 321. Jones v. Boyce, 1 Stark. N. P. C. 493. Christie v. Griggs, 2 Campb. N. P. C. 80. Sharp v. Grey, 2 Moore & Scott, 620.

In the next place they are bound to provide careful drivers, of reasonable skill, and good habits, for the journey; and to employ horses which are steady, and not vicious or likely to endanger the lives of the passengers (*u*). In the pithy language of an eminent judge, it may be said that the coachman must have competent skill; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage (*x*).

In the next place, they are bound not to overload the coach either with passengers or luggage (*y*), and to take care that the weight is suitably adjusted, so that the coach is not top-heavy, and made liable to upset (*z*).

In the next place they are bound to receive and to take care of the luggage customarily allowed to passengers to carry (*a*).

And, in all these cases, they are not only personally bound for their own acts, but for the acts of their ser-

(*u*) *Waland v. Elkins*, 1 Stark. N. P. C. 272. *Christie v. Griggs*, 2 Camp. N. P. C. 79. *Harris v. Costar*, 1 Carr. & P. N. P. C. 636. *Crofts v. Waterhouse*, 11 J. B. Moore, 133, 3 Bing. R. 321.

(*x*) Per Best, C. J., in *Crofts v. Waterhouse*, *Ibid*.

(*y*) Superadded to their common law responsibility for injuries resulting from overloading, they are subject to penalties under certain statutory regulations, though no injury may have resulted to individuals.

(*z*) *Long v. Horne*, 1 Carr. & P. N. P. C. 612. *Israel v. Clarke*, 4 Esp. N. P. C. 259. *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(*a*) *Robinson v. Dunmore*, 2 Bos. & P. 419. 4 Esp. N. P. C. 177. 6 East, R. 564.

vants and agents, and also, in cases of partnerships, for the acts of their partners (*b*).

2. *Their Duties on the Progress of the Journey.*]—Passenger carriers are bound to stop at the usual places, and allow the usual intervals for refreshment to the passengers; and they cannot, at their mere caprice, vary or annul these accommodations; for, every passenger is understood to contract for the usual accommodations.

They are bound to make use of all the ordinary precautions for the safety of passengers on the road. This involves a consideration of the duties of the coachman in driving on the road. If he is guilty of any rashness, negligence, or misconduct, or is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injury resulting from his acts. Thus, if the driver drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable (*c*). So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers (*d*). So, if he takes the wrong side of the road, and an accident happens from want of proper room (*e*). In short, he must in all cases exercise a sound and reasonable discretion in travelling on the road, to avoid dangers and difficulties; and, if he omits, his principals are liable (*f*). And the liability of the coach proprietors will be the same, although the injury to the passenger is caused by his

(*b*) *Waland v. Elkins*, 1 Stark. N. P. C. 272. *Holt*, N. P. C. 227.

(*c*) *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(*d*) *Dudley v. Smith*, 1 Camp. N. P. C. 167.

(*e*) *Wordsworth v. Willan*, 4 Esp. N. P. C. 273. *Waland v. Elkins*, Stark. N. P. C. 272.

(*f*) *Jackson v. Tollett*, 1 Stark. N. P. C. 37.

own act, as, by leaping from the coach, if there is real danger, and the danger arises from the careless conduct of the driver (*g*).

There are in England three customary rules or directions for driving—first, that, in meeting, each party shall bear or keep to the left—secondly, that, in passing, the foremost person bearing to the left, the other shall pass on the right side,—thirdly, that, in crossing, the driver coming transverse shall bear to the left hand, so as to pass behind the other carriage (*h*). But the rule is not inflexible that the driver shall in all cases pass on the left side. He may, if the street or road is very broad, go on the near side (*i*). So, if there is no other carriage on the road, whose passage may be interrupted, the driver is not bound to keep the left side of the road, but he may in such cases go on either side of the road, as he pleases (*k*); and the mere fact of the driver being on the wrong side of the road, will not of itself make the carrier responsible for any accident, unless the driving was negligent.

3. *The Termination of the Journey.*—In all cases the coach proprietors are bound to carry the passengers to the end of the journey, and to put them down at the usual place of stopping; and if that is an inn-yard, it is not sufficient to put them down on the outside of the gateway of the inn (*m*). If they agree to take a passenger

(*g*) *Jones v. Boyce*, 1 Stark. N. P. C. 493. *Crofts v. Waterhouse*, 11 J. B. Moore, 133, 3 Bing. R. 321.

(*h*) *Petersd. Abr. Carrier*, p. 55, note; and see *Wayde v. Carr*, 2 Dow. & Ry1. 255.

(*i*) *Ibid.* *Wordsworth v. Willan*, 4 Esp. N. P. C. 273.

(*k*) *Aston v. Heaven*, 2 Esp. N. P. C. 533. *Mayhew v. Boyce*, 1 Stark. N. P. C. 423.

(*l*) *Crofts v. Waterhouse*, 11 J. B. Moore, 133, 3 Bing. R. 319, 321.

(*m*) *Dudley v. Smith*, 1 Camp. N. P. C. 167.

to a particular place, this also becomes obligatory on them (n).

4. *As to the Liabilities of Passenger Carriers.*—These naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries except by the act of God or public enemies, the inquiry is naturally presented, what is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. They are bound only to *due* care and diligence in the performance of their duty (o). But, in what manner are we to measure this due care and diligence? Is it ordinary care and diligence, which would make them liable only for ordinary neglect, or is it extraordinary care and diligence, which would render them liable for slight neglect? As they undertake for the carriage of human beings whose lives and limbs and health are of great importance as well to the public as themselves, the ordinary principles, in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held, that the passenger carrier binds himself to carry safely those whom he takes into his coach, *as far as human care and foresight will go* (p), that is, for the utmost care and diligence of very careful persons.

But passenger carriers, not being insurers, are not responsible for accidents, where all reasonable skill and

(n) *Ker v. Mountain*, 1 Esp. N. P. C. 627.

(o) *Harris v. Costar*, 1 Carr. & P. N. P. C. 636. *Crofts v. Waterhouse*, 11 J. B. Moore 133, 3 Bing. R. 321.

(p) *Aston v. Heaven*, 2 Esp. N. P. C. 533. *Christie v. Griggs*, 2 Camp. N. P. C. 79. *White v. Boulton, Peake*, N. P. C. 81.

diligence has been employed. When every thing has been done which human prudence can suggest, accidents may happen. The lights may, in a dark night, be concealed by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally, by striking another vehicle, or meeting with an unexpected obstruction. In all these and the like cases, if there is no negligence, the coach proprietors are exonerated (*q*).

5. *Rights of Passenger-Carriers.*]—As they are under obligations to carry passengers, and cannot properly refuse them when they have accommodation, so, on the other hand, they are entitled to be secure of their reward or compensation. They have, therefore, a right to demand their fare at the time the passenger engages his seat; and, if he refuses, they may fill up his place with other passengers (*r*). They have also a lien upon the baggage of the passenger for his fare; but not on his person, nor on the clothes he has on (*s*).

The Rights, Duties, and Liabilities of Passenger-Carriers by Water.]—The conduct of carrier vessels on the ocean, has, in several instances, come under the examination of the judicial tribunals; and a law of the sea, as well as a law of the road, has been recognised, as to their rights and duties.

According to Lord Stowell, there are four possibilities under which accidents may occur by the running foul or collision of two vessels on the ocean. In the first

(*q*) *Crofts v. Waterhouse*, 11 J. B. Moore, 133, 3 Bing. 321. *Christie v. Griggs*, 2 Camp. N. P. C. 79. *Aston v. Heaven*, 2 Esp. N. P. C. 533.

(*r*) *Ker v. Mountain*, 1 Esp. N. P. C. 627.

(*s*) *Wolf v. Sumners*, 2 Camp. N. P. C. 631.

place, it may happen without blame being imputed to either party; as, where the loss is occasioned by a storm, or any other *vis major*. In that case, the loss must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence or of skill on both sides. In such a case, the rule is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran down the other; and in this case, the injured party would be entitled to an entire compensation from the other (*t*). The antient general maritime law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule England for a long time conformed; but Holland having, for the protection of its own navigation, limited the remedy to the value of the ship, freight, apparel, and furniture, England has recently followed the example, and established by statute a like limitation (*u*). In

(*t*) This is the language of Lord Stowell, in the *Woodrop Sims*, 2 *Dodson*, 83, 85. But in the second case, the negligence of the other would, at common law, be a defence to any action by either of them; and even Lord Stowell's authority, though it accords with the civil law, and is adopted by Dr. Story, scarcely removes beyond doubt the above proposition.

(*u*) See ante, p.

America no positive enactment has been made; and therefore the responsibility of the vessel and its owners stands upon the general maritime law.

Another case has been put by a learned commentator upon commercial law (*x*). It is where there has been some fault or neglect, but on which side the blame lies is inscrutable, or left by the evidence in a state of uncertainty. In such cases, many of the maritime states of continental Europe have adopted the rule to apportion the loss between the two vessels. In the Scottish law, this point seems left undetermined; although one of her early jurists has considered the rule to be the same as the rule of apportionment on the continent (*y*). The English law, at the time when Mr. Bell published the last edition of his commentaries, had not furnished any authority either for or against the rule. In a recent case of collision, however, Sir Christopher Robinson, in summing up the facts to the Masters of the Trinity House, whom he had called to his assistance, made the following remarks: "The result of the evidence will be one of three alternatives; either a conviction on your minds that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect; or third, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel, according to the rules of navigation, which ought to have governed them" (*z*). It is not perhaps quite certain, whether the learned judge had in his mind at the moment a case where there was a collision by some fault, but it was uncertain by which party, when he

(*x*) Mr. Bell, 1 Com. 579.

(*y*) Ibid.

(*z*) The Catherine, of Dover, 2 Hagg. 145, 154.

speaks of "a state of reasonable doubt as to the preponderance of evidence," or whether he applied that language to a doubt whether it was a loss by accident or not; though the former would seem to be the natural construction. If his language was meant to apply to a case of inscrutable fault or blame, then the rule in England would seem to be not to apportion in a case of loss by inscrutable fault or blame. If it was meant to apply merely to the question of accident, then the rule is still open to controversy in England. If the question is still open to controversy, there is great cogency in the reasoning of Mr. Bell in favour of adopting the rule of apportioning the loss between the parties. Many learned jurists support the justice and equity of such a rule, and especially it has the strong aid of Pothier and Emerigon.

In all these cases of collision the essential question is, whether proper measures of precaution are taken by the vessel which has unfortunately run down the other. This is partly a question of nautical usage, and partly a question of nautical skill. If all the usual and customary precautions are taken, then it is treated as an accident, and the vessel is exonerated. If otherwise, then the offending vessel and its owners are deemed responsible. Some rules, however, which probably had their origin in the customs of navigation, are now adopted as positive rules of law. Thus, the law imposes upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, and of shewing that it has done so; otherwise the owners will be responsible for any loss which ensues (a). Therefore, a vessel sailing *with* the wind must

(a) *The Woodrop Sims*, 2 Dodson, 83. *The Thames*, 5 Rob. 345.

give way to one sailing *by* the wind ; and the vessel sailing *by* the wind is not obliged to alter her course. Another rule is, that the owner of a vessel entering a port or river where other vessels are lying at anchor, is bound to make use of all proper checks to stop the head-way of his vessel, in order to prevent accidents ; and if, from want of such precautions, a loss ensues, he and his owners will be responsible (*b*). Another rule is, that, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack is to persevere in her course, while that on the larboard is to bear up, or keep more away before the wind (*c*). And, in respect to steam-boats, as they do not receive their impetus from sails, but from steam, they are capable of being kept under better command ; and therefore it seems, from their greater power, they ought always to give way in favour of a vessel using sails only (*d*). There are some other rules laid down by Emerigon and other foreign jurists ; but, as they do not appear to be expressly recognized in the common-law, it may be questionable how far they constitute a part of the general law of the sea (*e*).

(*b*) *The Neptune*, 1 *Dodson*, 467.

(*c*) *The Shannon*, 2 *Hagg*, 174.

(*d*) *Id. ibid.*

(*e*) *Emerig. Assur. ch. 12, s. 14.*

THE CARRIERS' ACT.

11 GEO. 4 & 1 GUL. 4, c. 68.

An act for the more effectual protection of mail-coach contractors, stage-coach proprietors, and other common carriers for hire, against the loss of, or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.

I. Whereas, by reason of the frequent practice of bankers and others sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased: And whereas, through the frequent omission by persons sending such parcels and packages to notify the value and contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with the knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this act, no mail contractors, stage-coach proprietors, or other common car-

rier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, and securities for payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, gold or silver plate, or plated goods, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in the parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article, or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package.

II. And be it further enacted, That, when any parcel or package containing any of the articles above specified shall

be so delivered, and its value and contents declared as aforesaid, and such value shall exceed ten pounds, it shall be lawful for such mail contractors, coach proprietors, and other common carriers, to demand and receive an increased charge to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charges required to be made over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office, shall be bound by such notice, without further proof of the same having come to their knowledge.

III. Provided always, and be it further enacted, That, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and, if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate or charge.

IV. Provided always, and be it further enacted, that from and after the first day of September now next en-

suing, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any way affect the liability at common law of any such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, for or in respect of any articles or goods to be carried or conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall, from and after the first day of September, be liable as at the common law, to answer for the loss of, or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

V. And be it further enacted, That, for the purposes of this act, every office, warehouse, or receiving-house which shall be used or appropriated by any mail contractor, or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued in his, her, or their names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor, or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

VI. Provided always, and be it further enacted, That nothing in this act contained, shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor,

or common carrier, and any other parties, for the conveyance of goods and merchandizes.

VII. Provided also, and be it further enacted, That where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

VIII. Provided also, and be it further enacted, That nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ; nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

IX. Provided also, and be it further enacted, That such mail-coach contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid; but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence; and that the mail-coach contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as aforementioned.

X. And be it further enacted, That, in all actions to

be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss or injury of any goods delivered to be carried; whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

XI. And be it further enacted, That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

—◆—

COGGS *v.* BERNARD (*a*).

[*Trinity Term, 2 Annæ Regiæ.*]

HOLT, Chief Justice.—The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that, for want of care in him, some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

If a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage.

(*a*) For a statement of the case vide Jones, ante, p. 58. S. C. 2 Ld. Raym. 909; Com. 133; Salk. 26; 3 Salk 11; Holt. 13; Entry, Salk. 735; 3 Ld. Raym. 163.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But, upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And (b) there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*: and it is that sort of bailment which is mentioned in Southcote's case. The second sort is, when goods or chattels that are useful, are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left by the bailee to be used by him for hire; that is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*; and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain

Commodatum.

Pawns.

Things to be carried, &c. for a reward.

To be carried without reward.

(b) Vide ante 35; 2 Ld. Raym. 913.

the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the (c) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stolen without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (d) my Lord Coke has improved the case in his report of it; for, he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For, if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But, according to this doctrine, the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But, to shew that the tenor of the law was always otherwise, I shall give a his-

A man who receives goods to keep gratis for the use of the bailor is not answerable for their loss or for any damage they may sustain, unless he was guilty of some gross neglect with respect to them. Vide Str. 1099. Nor even then, if he was guilty of the same neglect with respect to his own. D. acc. 2 Ld., Raym. 655. Semb. acc. Burr. 2300.

(c) Vide *ante*, 36.

(d) Vide 2 Ld. Raym. 655; *ante*, 41.

tory of the authorities in the books in this matter, and by them show, that there never was any such resolution given before Southcote's case. The 29th Ass. 23, is the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stolen. As for 8 Edw. 2, Fitz. Detinue, 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods: that case, they say, differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For, the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40 b. was but a debate at bar. For, Danby was but a counsel then, though he had been chief justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. 7. 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always, at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was,

to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend; but, so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For, if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for, the keeping them as he keeps his own, is an argument of his honesty. A fortiori he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3. c. 2. 99 b. J. S. *apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.* As, suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for, there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto*

A gross neglect
an evidence of
fraud.

Though a man
who takes goods
to keep gratis
for the use of
the bailee ex-
pressly under-
takes to redeli-
ver them safely,
he is not re-
sponsible for any
loss or damage
occasioned by a
wrong-doer.
The borrow-
er of goods is
responsible for
any damage
or loss if it was
occasioned by
his neglect.
Or, if he used the
goods in a man-
ner not war-
ranted by the
terms of the
loan.

amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet. So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For, if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers 3 Cro. 214. acc. 2 Cro. 425. acc. upon a promise for quiet enjoyment. And, if a promise will not charge a man against wrong-doers when put in writing, it is hard it should do it more so when spoken. Doct. and Stud. 130. is in point, that, though a bailee do promise to re-deliver goods safely, yet, if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. commodatum or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as, if the bailee be guilty of the least neglect, he will be answerable: as, if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him un-

der, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, ubi supra: his words are—*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuat accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quòd talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit, non est dubium quin ad rei restitutionem teneatur.*—I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put the horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But, if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says; the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must

Note, in the Bracton before me, it is commodatam, but that must be a mistake, as you will find by Justinian, ubi supra, from whence Bracton has taken all his distinctions, and that almost word for word.

The borrower of goods shall not be responsible for a loss by robbery, unless the robbery was occasioned or facilitated by some neglect on his part.

The hirer of goods is responsible wherever the borrower would be.

recur to my old author, fol. 62. b. Qui pro usu vestimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.—From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (e) bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., vadium, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (f) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (f) pawnee cannot use it, as clothes, &c. but if it be such; as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and

If a pawnee use the pawn about the keeping of which he is at no charge, he is answerable at all events for any loss or damage which may happen with respect to it while he is using it. S. P. 3 Salk. 268. Holt 528. Salk. 522.

(e) D. acc. 2 Ld. Raym. 1087.

(f) S. P. 3 Salk. 268. Holt. 528. Salk. 522.

is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow. 123.* But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, *Bracton 99. b.* gives you the answer—Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere.—In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and, notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is *29 Ass. 28.* and *Southcote's case* is. But indeed the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Assize*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special

The pawnee of goods is responsible for any loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence; otherwise he is not. *S. P. 3 Salk. 268. Salk. 512.*

But he is answerable at all events for any loss or damage which happens after he ought to have returned the pawn. *S. P. 3 Salk.*

268. Holt 528.
Salk. 522, vide
2 Ld. Raym.
735. Ante, 79.
A man that
keeps goods by
wrong is at all
events answer-
able for their
loss or damage.

property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found (*g*).

If goods are
delivered to a
person in a
public employ-
ment, for a
purpose in re-
spect of which
he is to have a
reward, he is
answerable for
any loss or
damage which
is not occasion-
ed by the act of
God or the
king's enemies.
S. P. Holt, 131,
R. acc. 1 Wils.
281. Barclay v.
Yann, B. R.
E. T. 24 G. 3.
Trent and Mer-
sey Company v.
Wood, B. R.
E. T. 25 G. 3,
1 T. R. 27.
Vide 2 Ld.
Raym. 264. Str.
128. Burr. 2300.
2827.
Ante, 103.

As to the fifth sort of bailment, viz. a delivery to carry, or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case, of a master of a ship, was first adjudged 26 Car. 2, in the case of *Mors v. Slew*, Raym. 220, 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king (*h*). For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And

(*g*) Ante, p. 52, n. 21.

(*h*) This has been altered by statute. See ante, Appx. pp. viii. & x.

though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3. 100. it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his Commentaries upon Justinian,

A bailiff or factor, though he is to have a reward, is not answerable for any loss or damage which was not occasioned or facilitated by his neglect. S. P. Holt, 131. Vide 1 Vent. 121. 2 Lev. 5. ante, 97.

A man to whom goods are delivered for a purpose in respect of which he is to have no reward, is not answerable for any loss or damage occasioned by a third person.

Case lies for negligently executing a gratis commission. Vide 1 H. Bl. 158.

lib. 3. tit. 27. 684. defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis*. I don't find this word in any other author of our law besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

A breach of a trust undertaken voluntarily is a good ground for an action.

Vide ante, 54, 55.

The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily is a good ground for an action (i). 1 Roll. Abr. 10; 2 Hen. 7, 11; a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because, when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I

(i) 2 Ld. Raym. 911.

answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (*k*) defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 Hen. 6, 49; and the other cases cited by my brothers, shew that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain (*l*). There has been a question made, if I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said, by the judges, to be a bad resolution, and the contrary to that reversal was afterwards most solemnly

If a man promises to re-deliver goods in consideration of having them delivered to him, an action will lie against him for not re-delivering them.

(*k*) Vide ante, 56, 57, 61.

(*l*) 2 Ld. Raym. 920.

adjudged in 2 Cro. 667, Tr. 21, Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so, a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Slew* was drawn by the greatest drawer in England at that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. Judgment for the plaintiff.

INDEX.

ACCIDENT,

inevitable, what is, 105.

ACT OF GOD,

what, 104, vii.

ACTION,

by depositary, 53, n.

depositor, 53, n.

on joint deposits, 52, n. (20).

by mandatary, 63, n.

borrower, 71, n.

lender, *id.*

pawnee and pawner, 83, n. (84).

AGISTERS OF CATTLE, 91, n. (45).

BAILMENT,

definition of, 1.

different kinds of, 35.

BORROWER IN CASES OF GRATUITOUS LOANS,

interest and rights of, 71, n.

use of loan by, 68.

duties of, 65.

diligence and care by, *ib.*

liability for losses, *ib.*

where he saves his own goods, 69.

BURTHEN OF PROOF, 66, n. (33); 87, n. (41).

in cases of hire of things, 87, n. (41).

custody, 97, n.

carriage of goods, xxi.

loan, 66, n. (31).

CANAL BOATMEN,

are common carriers, ii.

CARTMEN,

are common carriers, ii.

CASUALTY,

inevitable, 39, n.

COACH PROPRIETORS,

when and how far common carriers, ii.

COMMON CARRIERS—See HIRE OF CARRIAGE OF GOODS.**CONCEALMENT,**

in deposits, 37, n. (12).

loans, 70.

CONDUCT, what,**CONTRACTS,**

special, construction of, 38, n. (13).

to keep safe, effect of, *id.*

when it includes risk of casualties, *id.*

COLLISION OF SHIPS,

loss by, xxxi.

DEMAND OF DEPOSIT,

when there should be, 53, n.

DEPOSIT,

definition of, 35.

quasi, 52, n. (21).

second deposit by bailee, 53, n.

obligations of depositary, 45, n. (17).

degree of care and diligence on, 36 *et seq.*

special contract to keep safe, 39, n.

in cases of finding, obligations, 52, n. (21).

when depositary may use, 50, n. (19).

when package sealed, 37.

property in, whether depositary has, 52, n.

restitution of, 53, n.

by servants, *id.*

conflicting claims to, *id.*

joint effect of, 52, n. (20).

whether to be kept as depositary keeps his own goods, 45,
n. (17).

DEPOSITARY,

responsibility of, 36,

keeping goods as he keeps his own, 45, n. (17).

DILIGENCE,

degrees of, 5 *et seq.*

what required in different bailments, 21 *et seq.*

ENEMIES,

public, who are deemed, vii.

pirates are, viii.

EXECUTION,

pawns not liable to, 84, n.

FACTORS, 84, n.

FINDER OF GOODS,

obligations and rights of, 52, n. (21).

FRAUD,

whether gross negligence amounts to, 21, n. (5).

GROSS NEGLIGENCE,

what, 21.

whether equivalent to fraud, 21, n. (5).

GUEST AT AN INN,

who is deemed, 95, n. (47).

HIRE, CONTRACT OF, 85.

HIRE OF THINGS, *id.*

degree of diligence in, *id.*

responsibility of hirer for acts of servants, 89, n. (43).

duty of hirer as to horses, 87, n. (41).

use of the thing hired, *id.*

HIRE OF WORK, OR LABOUR AND SERVICES, 90.

degree of diligence required, *id.*

skill, when, and what required, *id.*

HIRE OF CUSTODY,

agisters of cattle, 91, n. (45).

warehousemen, 96, n. (48).

wharfingers, 97, n.

when responsibility in, begins and ends, 97, n.

factors and bailiffs, rights and duties, 98.

HIRE OF CARRIAGE OF GOODS, 103

- by private persons, i.
- common carriers, i.
- liability of, 103.
- who are common carriers, i.
- carriers by land, ii.
 - water, *id.*
- joint carriers, iv.
- liability of, for servants, v.
- duties and obligations of, *id.*
- risks of, at common law, vii.
- act of God, what, *id.*
- loss by rats, 105, n. (53).
- collision of ships, xxxi.
- what losses by natural accidents they are liable for, 105 *et seq.*
- what are losses by the king's enemies, vii.
- loss by jettison, xiii.
- liability for thefts by crew,
 - onus probandi* on the carrier, xii.
- loss of goods stowed on deck, xiii.
- commencement of carrier's risk, xiv.
- carriers who are also warehousemen, xv.
- carriers who are also forwarding merchants, xvi.
- termination of carrier's risk, *id.*
- delivery of goods, xvii.
- special contracts and notices of carriers, xi. xii.
- effect of intentional deception, xii.
- goods of certain value paid for as such, xi.
- excuse for non-delivery of goods, xxi.
- acts of shipper excusing non-delivery, xxii.
- stoppage of goods *in transitu*, *id.*
- demand of goods by person having a superior title, xxiii.
- average and contribution, xxiii.
- compensation of carriers by land for necessary expenses, xxiv.
- general rights of carriers, xxiv.

HIRE OF CARRIAGE OF PASSENGERS,

- passenger-carrier by land, xxvi.
- commencement of the journey, duties on, *id.*
- progress of the journey, duties on the, xxviii.
- coachman, duties of, *id.*
- rule of the road, xxix.
- termination of the journey, duties on, *id.*

HIRE OF CARRIAGE OF PASSENGERS—*(continued).*

- liability of passenger-carriers by land, xxx.
- their rights, xxxi.
- passenger-carriers by water, *id.*
- collision, four sorts of, xxxi.
- collision, where the fault is inscrutable, xxxiii.
- collision by pure accident, or the act of God, xxxii.
- precaution, rules of, xxxiv.

INEVITABLE ACCIDENT,

- what is, 105.

INNKEEPER,

- responsibility of, 92.
- who are deemed innkeepers, 94, n. (47).
- delivery to, whether necessary, 95, n. (47).
- rights and duties of, *id.*
- who are guests, *id.*
- liability of, *id.*
- what will excuse, *id.*

LIMITATIONS, STATUTE OF,

- how and when it applies to pawns, 84, n.

LOAN, GRATUITOUS, CONTRACT OF,

- definition of, 35.
- for joint benefit, 72.
- use of the thing, 69, n. (32).
- when use personal, *id.*
- obligations of borrower, 68, *et seq.*
- diligence, degree of, required, *id.*
- losses, when borrower responsible for, *id.*
- saving goods in case of fire, 69, n. (33).
- restitution of, how and when, 73.
- burthen of proof, in cases of, 66, n. (31).
- property, whether borrower has any, 71.

MANDATE, CONTRACT OF,

- definition of, 35.
- distinction between it and deposit, 52.
- degree of diligence required in,
 - to do work, 53, n. (22).
 - to carry goods, *id.*

MANDATE, CONTRACT OF—*continued*.

officious offer, effect of, 47, n. (18).

user and misuser of, 63, n.

MANDATARY,

whether he has a special property, 63, n.

rights of action by, *id*.

obligations and duties of, 62, n. (28).

whether liable for nonfesance, 57, n. (25).

MORTGAGE,

how it differs from a pawn, 83, n. (40).

MUTUUM,

what, 64.

NEGLIGENCE,

degrees of, 7.

gross, what, 21.

whether equivalent to fraud, 21, n. (5).

NEGOTIORUM GESTOR,

who is, 48, n. *; *et* 63, n. (29).

NEGOTIABLE INSTRUMENTS,

pawn of, 83, n.

NONFESANCE,

in cases of mandate, 54.

hire of services, 57, n. (25).

NOTICES BY COMMON CARRIERS,

effect of, xi.

ORDINARY DILIGENCE,

definition of, 6.

ORDINARY NEGLIGENCE,

definition of, 8.

OFFICIOUS OFFER,

effect of, 47, n. (18).

PASSENGER CARRIERS,

by land, xxvi.

water, xxxi.

PAWN OR PLEDGE,

- contract of, 74.
- definition of, 35.
- difference from a mortgage, 83, n. (40).
- property, what in pledger, 84, n.
 - what in pledgee, 83, n.
- of negotiable instruments, 83, n.
- delivery of pawn, *id.*
- re-delivery to owner, effect of, *id.*
- rights of pawnee, *id.*
- retainer for another debt, when, *id.*
- sale of pawn, when and how, 84, n.
- transfer of pawn by pawner, *id.*
 - pawnee, *id.*
- use of pawn by pawnee, 81, *et id.* n. (38).
- degree of care and diligence, 74, *et id.* n.
- presumption in case of theft, *id.*
- refusal to restore, effect of, 84, n.
- rights of pawner, *id.*
- redemption of pawn, *id.*
- prescription, or statute of limitations in case of pawns, *id.*

PAWNEE,

- rights and duties of, 83, n.; 84, n.
- retainer for other debts, 83, n.
- transfer of pawn by, *id.*
- diligence and care, degree required, 74.

PAWNER,

- right and duties, 84, n. *et seq.*
- redemption by, *id.*
- transfer by, *id.*

PLEDGE—See PAWN.

POSTMASTER,

- rights and liabilities of, 109, *et id.* n. (59).

PRESUMPTION,

- of fraud from gross negligence, 21, n. (5).

RATS,

- loss by, 105, *et n.* (35).

SERVANTS, ACT OF,

when master liable for, or not, 89, n. (43).
 innkeepers, when liable for, *id.*
 common carriers, when liable for, v., xl.

STAGE PROPRIETORS,

liability of, xxx.

THEFT,

when presumptive of negligence, 43, et n. (16).

USE BY BAILEE, RIGHT OF, when,

in deposits, 50, n. (19).
 loans, 69, n. (32).
 pawns, 80, 81, n. (38).

VALUATION OF THINGS BAILED,

effect of, 71.

VALUE OF BAILMENT,

effect of, as to diligence, 37, n. (12).

VALUE OF BAILMENT, (officious),

effect of, 47, n. (18).

WAREHOUSEMEN,

degree of diligence, 97.
 when liability begins and ends, 97, n. (48).

WHARFINGERS,

degree of diligence of, 97, n. (48).
 liability, when it begins and ends, *id.*

FINIS.



STANFORD UNIVERSITY LAW LIBRARY

DL AJS AW64

An essay on the law of bailmen

Stanford Law Library



3 6105 044 263 049